

(27,084)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 359.

JAMES A. OWNBEY, PLAINTIFF IN ERROR,

vs.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON,
HERBERT L. SATTERLEE, AND LEWIS C. LEDYARD,
AS EXECUTORS OF THE ESTATE OF JOHN PIERPONT
MORGAN, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF DELAWARE.

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Original.

Supreme Court of the United States.

JAMES A. OWNBEY, Plaintiff in Error,
against

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Defendants in Error.

Petition for Writ of Error.

Now comes James A. Ownbey, by Herbert H. Ward and Louis Marshall, his attorneys, and says that on the 21 day of March, 1919, the Supreme Court of the State of Delaware made and entered a final judgment herein in favor of John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, the defendants in error above named, in which final judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

The Supreme Court of the State of Delaware is the highest court of the State of Delaware in which a decision in this cause could be had.

Wherefore your petitioner prays that a writ of error may issue in his behalf from the Supreme Court of the United States to the Supreme Court of the State of Delaware for the correction of the errors and a reversal of the judgment so complained of, that a transcript of the record, proceedings and orders in this cause, duly authenticated, be sent to the Supreme Court of the United States, that said writ of error operate as a supersedeas, that the amount of the security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security all further proceedings in said Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated, Wilmington, Delaware, March 27, 1919.

JAMES A. OWNBEY, *Petitioner*,
By HERBERT H. WARD AND
LOUIS MARSHALL,
His Attorneys.

HERBERT H. WARD,
LOUIS MARSHALL,
Counsel.

Supreme Court of the United States.

JAMES A. OWNBey, Plaintiff in Error,
against

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEGYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Defendants in Error.

Assignments of Error.

Now comes James A. Ownbey, plaintiff in error in the above entitled cause, by Herbert H. Ward and Louis Marshall, his attorneys, and says that, in the record and proceedings aforesaid, there is manifest error in this, to wit:

First. In that the Supreme Court of the State of Delaware erred in affirming the judgment or order made on April 5, 1916, by the Superior Court of the State of Delaware in and for New Castle County, wherein it was directed that the attempted appearance of Ward, Gray & Neary for the plaintiff in error and the docket entries of such appearance made by the Prothonotary and that the pleas and reply of the plaintiff in error to the motion of the defendants in error marked filed by the Prothonotary, be stricken from the files of said Court, that judgment for want of appearance collectible from the property attached be entered in favor of the defendants in error and against the plaintiff in error, and that the amount of said judgment be ascertained by inquest at bar, inasmuch as the statutes of the State of Delaware in supposed conformity with which said order or judgment was rendered and the proceedings thereunder in this cause are

4 in violation of the Fourteenth Amendment to the Constitution of the United States and void, because the plaintiff in error was and is thereby deprived of his property without due process of law and because he was thereby denied the equal protection of the laws contrary to said Fourteenth Amendment.

Second. In that the Supreme Court of the State of Delaware erred in affirming the judgment or order made on April 5, 1916, by the Superior Court of the State of Delaware in and for New Castle County, whereby there was stricken out of the record of this cause the appearance of the plaintiff in error, James A. Ownbey, by his attorneys, in consequence whereof he was prevented from making his defense against the claims of the defendants in error in this cause and judgment for want of his appearance was rendered in favor of the defendants in error against the plaintiff in error, inasmuch as the statutes of the State of Delaware in supposed conformity with which said order or judgment was rendered and the proceedings thereunder are in violation of the Fourteenth Amendment to the Constitution of the United States and void, the plaintiff in error being thereby deprived of his property without due process of law and of the equal protection of the laws.

Third. In that the Supreme Court of the State of Delaware erred in affirming the judgment or order made on April 5, 1916, by the Superior Court of the State of Delaware in and for New Castle County, whereby there was stricken from the records of this cause the appearance of the plaintiff in error and there were stricken from the files of the Court the paper writings containing the pleas of the plaintiff in error to the merits of this cause which he had filed therein, in consequence whereof the Court prevented the plaintiff in error from defending against the claims of the defendants in error in this cause, and thereupon ordered judgment to be entered in supposed default of appearance in this cause by the plaintiff in error, in favor of the defendants in error and against the plaintiff in error, inasmuch as the statutes of the State of Delaware in supposed conformity with which said order or judgment was made and the proceedings thereunder are in violation of the Fourteenth Amendment to the Constitution of the United States and void, because thereby plaintiff in error was and is deprived of his property without due process of law and of the equal protection of the laws.

Fourth. In that the Supreme Court of the State of Delaware erred in affirming the judgment or order made on April 5, 1916, by the Superior Court of the State of Delaware in and for New Castle County, set forth in the foregoing assignments of error, inasmuch as the statutes of the State of Delaware in supposed conformity with which the proceedings in this cause were had and the order or judgment aforesaid was rendered, and under which statutes the defendants in error, upon their own affidavit or upon an affidavit made in their behalf alleging the indebtedness of the plaintiff in error to the decedent of the defendants in error in a sum exceeding \$50, were authorized to mark on the writ of attachment thereupon issued and to fix the amount of bail required in this cause at the sum of \$200,000, and thereupon to attach the property of the plaintiff in error and prevent his entry of appearance in said attachment suit or the making of his defense therein to the claim of the defendants in error, in default of the entry of said sum of \$200,000 of bail in said cause, and thereupon to obtain interlocutory judgment and to ascertain the amount of such interlocutory judgment ex parte, and to thereupon obtain final judgment in such cause and an order of sale and to make sale of the property so seized before the plaintiff in error should have any opportunity to enter any appearance in the cause or make defense to the claim of the defendants in error, in default of his ability to furnish said bail in the sum of \$200,000, are against the common right of the plaintiff in error and unconstitutional and void, because the plaintiff in error was and is thereby deprived of his property without due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the Supreme Court of the State of Delaware erred in affirming the judgment or order made on May 29, 1916, by the Superior Court of the State of Delaware in and for New Castle County, whereby it directed that the rule be discharged which it had ordered to issue upon the petition and motion of the plaintiff in error, to

show cause why the interlocutory judgment in favor of the defendants in error on the supposed default of appearance by the plaintiff in error might not be opened and why he might not be permitted to appear in the Superior Court of the State of Delaware in and for New Castle County and disprove or avoid the debt or claim of the defendants in error in this cause, inasmuch as the statutes of the State of Delaware and the proceedings thereunder in supposed conformity with and upon which said order was made are against the common right and in violation of the Fourteenth Amendment to the Constitution of the United States and void, because the plaintiff in error was thereby and is deprived of his property without due process of law and was denied the equal protection of the laws.

7 Sixth. In that the Supreme Court of the State of Delaware erred in affirming the judgment or order made on November 27, 1916, by the Superior Court of the State of Delaware in and for New Castle County, whereby it was adjudged that the rule be discharged which it had on May 29, 1916, issued to the defendants in error upon the petition of the plaintiff in error, to show cause why the final judgment entered in this cause might not be opened and why the plaintiff in error might not be permitted to appear in the Superior Court of the State of Delaware in and for New Castle County and disprove or avoid the alleged debt or claim of the defendants in error, and also why the said final judgment should not be vacated, inasmuch as the statutes of the State of Delaware and the proceedings thereunder in supposed conformity with and upon which said order was made were against the common right and in violation of the Fourteenth Amendment to the Constitution of the United States and void, because the plaintiff in error was and is thereby deprived of his property without due process of law and was denied the equal protection of the laws.

Seventh. In that the Supreme Court of the State of Delaware erred in affirming the judgment or order made on November 27, 1916, by the Superior Court of the State of Delaware in and for New Castle County, whereby it ordered and directed that the shares of capital stock belonging to the plaintiff in error of the Wootten Land and Fuel Company, or so many thereof as should be sufficient to satisfy the judgment obtained by the defendants in error against the plaintiff in error upon the writ of foreign attachment in this cause, be sold at public vendue to the highest bidders, upon such notice as is required for sales upon execution process, inas-

8 much as the statutes of the State of Delaware and the proceedings thereunder in supposed conformity with which the said order was made are against the common right and in violation of the Fourteenth Amendment to the Constitution of the United States and void, because the plaintiff in error was and is thereby deprived of his property without due process of law and was denied the equal protection of the laws.

Eighth. In that the Supreme Court of the State of Delaware erred in deciding that the statutes of the State of Delaware and the proceedings thereunder in this cause, whereby judgment was rendered against the plaintiff in error without according to him a hearing or

an opportunity to be heard, are nevertheless constitutional and that the plaintiff in error was not thereby deprived of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

Ninth. In that the Supreme Court of the State of Delaware erred in not reversing the several orders and judgments of the Superior Court of the State of Delaware in and for New Castle County in this cause and granting to the plaintiff in error the right to appear and to be heard, or accord to him an opportunity to appear and to be heard, in this cause, and to test therein the right of the defendants in error to the judgment rendered in their favor against him, such refusal constituting a deprivation of the plaintiff in error of due process of law and a denial of the equal protection of the laws.

Wherefore, for these and other manifest errors appearing in the record, James A. Ownbey, the plaintiff in error, prays that the judgment of the Supreme Court of the State of Delaware be reversed and set aside and held for naught, and that judgment be rendered for the plaintiff in error herein granting to him his rights under the laws and Constitution of the United States, and particularly the right to appear in this cause and to interpose his pleas and defenses therein.

LOUIS MARSHALL,

120 Broadway, New York City, New York;

HERBERT H. WARD,

Dupont Building, Wilmington, Delaware,

Attorneys and Counsel for Plaintiff in Error.

10 Supreme Court of the State of Delaware.

JAMES A. OWNBEY, Plaintiff in Error,

against

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Defendants in Error.

Allowance of Writ.

Comes now James A. Ownbey, the plaintiff in error above named, on this 27th day of March, 1919, and files and presents to this Court his petition praying for the allowance of a writ of error intended to be urged by him, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

Upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, and it appearing to this Court that in said action as heretofore presented to this Court rights, privileges and immunities were claimed by the plaintiff in error under

the Constitution of the United States and that the decision of this Court was against the rights, privileges and immunities specially set up and claimed under said Constitution, and that in said action there was drawn in question the validity of a statute of and an authority exercised under the State of Delaware on the ground
 11 of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity.

It is Ordered that a writ of error be allowed as prayed; provided, however, that James A. Ownbey, the plaintiff in error, give bond according to law in the sum of Twenty-five Hundred Dollars (\$2500.00), which said bond shall operate as a supersedeas bond.

In Testimony Whereof, witness my hand this 27th day of March, 1919.

JAMES PENNEWILL,

Chief Justice of the Supreme Court of Delaware.

12 Supreme Court of the United States.

JAMES A. OWNBEY, Plaintiff in Error,

against

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents, that we James A. Ownbey, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, in the full sum of Twenty-five Hundred Dollars (\$2500.00), to be paid to John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, and for the payment of which well and truly to be made we bind ourselves and each of us and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Scaled with our seals and dated the 27th day of March, 1919.

Whereas, the above named James A. Ownbey, the plaintiff in error, seeks to prosecute his writ of error in the Supreme
 13 Court of the United States to reverse the judgment rendered in the action entitled "James A. Ownbey, Plaintiff in Error, against John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, Defendants in Error," by the Supreme Court of the State of Delaware;

Now, therefore, the condition of the above obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect and shall answer all costs and damages that may be ad-

judged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

JAMES A. OWNBEY,
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By P. ALBERT BIRD,
Agent and Attorney in Fact.

Witness:-

WM. G. MAITLAND.
SIDNEY WORITZ.

This bond is approved this 27th day of March, 1919.

JAMES PENNEWILL,
Chief Justice of the Supreme Court of Delaware.

14 Supreme Court of the United States.

JAMES A. OWNBEY, Plaintiff in Error,
against

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L.
SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of
John Pierpont Morgan, Deceased, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, vs:

The President of the United States to the Honorable the Justices of
the Supreme Court of the State of Delaware, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said Supreme Court of the State
of Delaware before you at the January Term, 1917, thereof, being
the highest court of law or equity of said State in which a decision
could be had in the action between James A. Ownbey, plaintiff in
error, and John Pierpont Morgan, William P. Hamilton, Herbert L.
Satterlee and Lewis C. Ledyard, as Executors of the Estate of John
Pierpont Morgan, deceased, wherein rights, privileges and immu-
nities are claimed under the Constitution and statutes of the United
States, and the decision was against the rights, privileges and immu-
nities specially set up and claimed under said Constitution, and
wherein was drawn in question the validity of a statute of or an au-
thority exercised under the State of Delaware on the ground of
their being repugnant to the Constitution of the United States

15 and the decision was in favor of their validity, and manifest
error has happened to the great damage of the said James A.
Ownbey as by his complaint appears;

We, being willing that error, if any hath happened, shall be at once corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord one thousand nine hundred and nineteen.

[Seal of the District Court in Delaware.]

WM. G. MAHAFFY,
Clerk U. S. District Court, District of Delaware.

Allowed by
JAMES PENNEWILL,
*Chief Justice of the Supreme Court
of the State of Delaware.*

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Citation.

UNITED STATES OF AMERICA, ss:

To John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee, and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Delaware, wherein James A. Ownbey is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord one thousand nine hundred and nineteen.

JAMES PENNEWILL,
*Chief Justice of the Supreme Court
of the State of Delaware.*

17 In the Supreme Court of the State of Delaware.

No. 2, January Term, 1917.

JAMES A. OWNBEY, Defendant Below, Plaintiff in Error,

vs.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Plaintiffs Below, Defendants in Error.

Writ of Error to the Superior Court of the State of Delaware in and for New Castle County.

Record.

STATE OF DELAWARE,
New Castle County, ss:

At a Superior Court of the State of Delaware, in and for New Castle County, begun and held at Wilmington, on Monday, the Third day of January, A. D. 1916, among the records and proceedings of the said Court with others, was the following, to-wit:

No. 46, January Term, A. D. 1916.

[.EAL.]

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

vs.

JAMES A. OWNBEY.

Foreign Attachment Case.

Bail, \$200,000.00.

18 In the Superior Court of the State of Delaware in and for
New Castle County.

No. 46, January Term, 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L.
SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of
John Pierpont Morgan, Deceased,

vs.

JAMES A. OWNBEY.

Foreign Attachment Case.

Bail, \$200,000.00.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this twenty-second day of December,
A. D. 1915, personally came before me, the undersigned, a Notary
Public for the State and County aforesaid, Thomas W. Joyce, a
credible person, who being by me duly qualified according to law,
deposes and says: That the defendant James A. Ownbey resides out
of the State of Delaware and is justly indebted to the said plaintiffs
as executors of the Estate of John Pierpont Morgan, Deceased, in the
sum exceeding Fifty (\$50.) Dollars. THOS. W. JOYCE.

Sworn and subscribed before me the day and year above written.
Witness my hand and seal of office.

[SEAL.]

RAYFORD W. ALLEY,
Notary Public.

Notary Public, New York County, No. 163. Certificate filed in
Bronx County, No. 11.

Bronx County Register's No. 717.

New York County Register's No. 7116.

19 Be it remembered, that on this twenty-third day of Decem-
ber, A. D. 1915, came into Court this said plaintiff by Sauls-
bury, Morris & Rodney, Esqs., their attorneys, and sued forth out
of the said Court a Writ of the State of Delaware of Foreign Attach-
ment Case, which said Writ is in the words and figures following,
to-wit:

NEW CASTLE COUNTY,
State of Delaware, ss:

[SEAL.]

To the Sheriff of New Castle County, Greeting:

We command you, That you attach James A. Ownbey, late of
your County, yeoman, by all his goods and chattels, rights and

credits, lands and tenements, in whose hands or possession soever the same may be found within your Bailiwick, so that he be and appear before the Judges of our Superior Court at Wilmington, on Monday, the third day of January next, to answer John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard as Executors of the estate of John Pierpont Morgan, deceased, of a plea of trespass on the case, etc.

And that you summon the garnishee or garnishees to appear at the Court to which this Writ is returnable, then and there to declare what goods, chattels, rights credits, money or effects of the defendant or defendants, he, she or they hath or have in his, her or their hands, respectively: And have you then there this Writ:

Witness the Honorable James Pennewill at Wilmington the Thirteenth day of December, in the year of our Lord one thousand nine hundred and fifteen.

Issued, December 23, 1915.

JOSEPH WIGGLESWORTH,
Prothonotary.

20 And whereas afterwards, to-wit, on the Third day of January, A. D. 1916, came into Court the Sheriff of New Castle County, to whom said Writ was delivered for service, and made return endorsed thereon as follows, to-wit:

Attached all the shares of the capital stock of James A. Ownbey in the Wootten Land and Fuel Company, a Corporation of the State of Delaware, with all the rights thereto belonging, by leaving a certified copy of the within process with Arthur B. Smith, a director of the said Company, on the twenty-third day of December, A. D. 1915, and received from the said Arthur B. Smith, director as aforesaid, the certificate hereto attached marked (A) and made part of this return, showing the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company with the number or other marks distinguishing the same; and also by leaving a certified copy of the within process with Baldwin Springer, a director of the said The Wootten Land and Fuel Company, residing in the City of Wilmington, New Castle County, and State of Delaware, on the first day of January, A. D. 1916, and received from the said Baldwin Springer, director as aforesaid, the certificate hereto attached marked (B) and made a part of this return showing the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company with the number or other marks distinguishing the same.

So Ans.

HARRY J. STIDHAM, *Sheriff.*

The certificate marked (A) and made a part of the above return is in the words and figures following, to-wit:

21 In the Superior — of the State of Delaware in and for New Castle County.

No. —, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

I, Arthur B. Smith, do hereby certify, That I am a Director of The Wootten Land and Fuel Company, a Corporation of the State of Delaware; that the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company on the twenty-third day of December, A. D. 1915, with the number, or other marks distinguishing the same, are as follows:

Certificate number.	Number of shares.
25	5000
26	5000
34	5000
27	324½
28	500
29	500
30	1000
31	1000
32	2500
33	2500
35	10000

making a total of shares so held and owned by the said James A. Ownbey of 33,324½.

Dated, December 24th, 1915.

ARTHUR B. SMITH,
Director of The Wootten Land and Fuel Company.

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(Certificate "B.")

In the Superior — of the State of Delaware in and for New Castle County.

No. —, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

I, Baldwin Springer, do hereby certify: That I am a director of the Wootten Land and Fuel Company, a Corporation of the State of Delaware; that I reside in the City of Wilmington, New Castle County and State of Delaware; that the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company with the number, or other marks, distinguishing the same, are as follows:

Certificate number.	Number of shares.
25	5000
26	5000
34	5000
27	324½
28	500
29	500
30	1000
31	1000
32	2500
33	2500
35	10000

making a total of shares so held and owned by the said James A. Ownbey of 33,324½.

Dated this first day of January, A. D. 1916.

BALDWIN SPRINGER,
Director of The Wootten Land and Fuel Company.

January 17, 1916.—Narr. with copy filed. (The same being in the words and figures following, to-wit:)

23 In the Superior Court of the State of Delaware in and for
New Castle County.

No. —, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L.
SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of
John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

STATE OF DELAWARE,
New Castle County, ss:

James A. Ownbey, who resides out of the State of Delaware, the defendant in this suit, was attached to answer John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, Executors of the last will and testament of John Pierpont Morgan, deceased, the plaintiffs in this suit in a plea of trespass on the case upon promises, and thereupon the said plaintiffs as Executors as aforesaid, by Saulsbury, Morris & Rodney, their attorneys, complain:

For that whereas the said defendant heretofore and in the lifetime of the said John Pierpont Morgan (now deceased) on the Third day of March in the year of our Lord 1913 to-wit: at the County aforesaid was indebted to the said John Pierpont Morgan (now deceased) in the sum of two hundred thousand Dollars lawful money of the United States of America for divers goods, wares and merchandise by the said John Pierpont Morgan (now deceased) to the said defendant before that time sold and delivered at the defendant's special instance and request;

24 And also in the further sum of Two hundred thousand dollars like lawful money, for the work, labor, care and diligence of the said John Pierpont Morgan (now deceased) by him before that time done, performed and bestowed in and about the business of the said defendant at his like special instance and request:

And also in the further sum of Two hundred thousand dollars like lawful money, for so much money by the said John Pierpont Morgan (now deceased) before that time lent and advanced, and paid, laid out and expended, to and for the use of the said defendant and at his like instance and request:

And also in the further sum of Two hundred thousand dollars like lawful money, for other money by the said defendant before that time, had, and received, to and for the use of the said John Pierpont Morgan (now deceased);

And also in the further sum of Two hundred thousand dollars like, lawful money for so much money then and there found to be

due and owing from the said defendant to the said John Pierpont Morgan (now deceased) and in arrear and unpaid, upon an account then and there stated between them;

And also in the further sum of Two hundred thousand dollars for so much money before that time and then and there due and payable from the said defendant to the said John Pierpont Morgan—(now deceased) for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said John Pierpont Morgan (now deceased), and by the said John Pierpont Morgan (now deceased) forewarned to the said defendant for divers long spaces of time before then elapsed at the like, special instance and request of the said defendant;

And being so indebted, he the said defendant in consideration thereof, afterwards, and in the life time of the said John Pierpont Morgan (now deceased) to-wit: on the day and year aforesaid, at New Castle County aforesaid, undertook, and then and there faithfully promised the said John Pierpont Morgan (now deceased) to pay him the several sums of of money in this Declaration
25 mentioned, when he the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding his said several promises and undertakings, but contriving to deceive and defraud the said John Pierpont Morgan (now deceased) and the said plaintiffs, as Executors, as aforesaid, since the death of the said John Pierpont Morgan, in this behalf, hath not as yet paid the said several sums of money or any or either of them or any part thereof, to the said John Pierpont Morgan (now deceased) in his lifetime, or to the said plaintiffs, since the death of the said John Pierpont Morgan, although often requested so to do; but the said defendant to do this hath wholly neglected and refused and doth still neglect and refuse to pay the same to the said plaintiffs to the damage of the said plaintiffs, as Executors, as aforesaid of the sum of Two Hundred Thousand Dollars, and therefore they bring their suit, etc.

And the said plaintiffs bring into Court here the Letters Testamentary of the said John Pierpont Morgan, deceased, under seal of office, or court, granting the same, whereby it fully appears to the said Court here that the said plaintiffs are Executors of the said last Will and Testament of the said John Pierpont Morgan, deceased, and have execution thereof, etc.

JOHN DOE,

RICHARD ROE,

Pledge-s, etc.

SAULSBURY, MORRIS & RODNEY,

Attorney- for Plaintiffs.

March second, A. D. 1916.—Defendant pleads with copy.

26 In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

Bail, \$200,000.

James A. Ownbey, the defendant in the above stated cause, by Ward, Gray & Neary, his attorneys, comes and defends the wrong and injury etc., hereby reserving to himself the right to hereafter apply for a Bill of Particulars to be filed by the plaintiffs in said cause, and in no respect waiving his right to said Bill of Particulars, and pleads,

Non Assumpsit.

Statute of Limitations.

Payment.

WARD, GRAY & NEARY,
Attorneys for Defendant.

March 13, A. D. 1916.—Motion to strike pretended appearance, pleas and docket entries from the record.

In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

27 It appearing from pages 24 and 75 of the Appearance Docket of this Court for the year 1916 that Ward, Gray & Neary, Esquires, Attorneys of this Court, have written their names opposite that of the above named defendant in said case in said Docket in the manner in which appearances for defendants in suits instituted by summons are usually entered, and

It further appearing that said Ward, Gray & Neary, Esqs., as

alleged attorneys for said defendant did on the second day of March, A. D. 1916 deliver to the Prothonotary of this Court a paper writing containing pretended pleas of the defendant to the declaration filed in the above stated case by the said plaintiffs; and

It further appearing that said Prothonotary did mark said paper writing "Filed" and did make entry in said Appearance Docket in words and figures, following, to-wit:

"March second, 1916.—Defendant pleads with copy.

Non Assumpsit.

Statute of Limitations.

Payment.

Rule reple and issues by second general rule day in March" and,

It further appearing that special bail or security required by the Statute of the State of Delaware in suits instituted by Writ of Attachment had not, and has not been given or entered in said case by the said defendant, or any person for him.

The plaintiffs in the above stated case, by Saulsbury, Morris & Rodney, their attorneys move that said pretended appearance of said Ward, Gray & Neary, Esqs., for said defendant and said entry made in the Appearance Docket by the Prothonotary as aforesaid be stricken out and that said paper writing containing pretended pleas in said case be stricken from the files of this Court.

SAULSBURY, MORRIS & RODNEY,

Attorneys for Plaintiffs.

March 14th, A. D. 1916.—On motion of Ward, Gray & Neary, Esqs., time for argument on the above motion was enlarged
28 to Thursday, March 23, 1916.

March 21st, A. D. 1916.—Reply to plaintiff's motion to strike off appearance and defense filed.

In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

Bail \$200,000.

Exit Writ December 23d, 1915.

To the motion of the Plaintiffs in the above stated cause by Saulsbury, Morris & Rodney, their attorneys, that said so-called pretended

appearance of Ward, Gray & Neary, for said defendant, and said entry made in the appearance docket by the Prothonotary, as aforesaid, be stricken out, and that said paper writing, containing so called pretended pleas in said cause, be stricken from the files of this Court, the Defendant replies:

1. That upon an affidavit by Thomas W. Joyce, an alleged credible person, that James A. Ownbey, the defendant in the above stated cause, is a non-resident of the State of Delaware, and indebted to the plaintiffs in said cause in a sum exceeding Fifty Dollars (\$50) a writ of foreign attachment issued out of this Court in said cause on the twenty-third day of December, A. D. 1916, being No. 46 to the January Term 1916, upon which writ the attorney of record for said plaintiffs, in said case, caused an endorsement to be made, fixing the bail or security upon said writ, necessary to be entered by defendant, to procure the discharge from attachment of the property to be attached thereunder, at the sum of Two Hundred thousand dollars, (\$200,000).

29 2. That pursuant to said writ of foreign attachment, the sheriff of New Castle County attached the shares of capital stock of said defendant in the Wootten Land and Fuel Company, a corporation of the State of Delaware, aggregating thirty-three thousand three hundred and twenty-four and one-third shares (33,324-1/3) each of the value of Five Dollars (\$5) and made return upon said writ as follows:

Sheriff returns: Attached all the shares of the capital stock of James A. Ownbey, in the Wootten Land and Fuel Company, a corporation of the State of Delaware, with all the rights thereto belonging by leaving a certified copy of the within process with Arthur B. Smith a director of the said company on the twenty-third day of December, A. D. 1915, and received from the said Arthur B. Smith, director as aforesaid, the certificate hereto attached, marked "A" and made a part of this return, showing the number of shares held or owned by the said James A. Ownbey, in the said the Wootten Land and Fuel Company with the numbers or other marks distinguishing the same and also by leaving a certified copy of the within process with Baldwin Springer, a director of the said the Wootten Land and Fuel Company, residing in the City of Wilmington, New Castle County and State of Delaware, on the first day of January, A. D. 1916, and received from the said Baldwin Springer, director as aforesaid, the certificate hereto attached, marked "B" and made a part of this return, showing the number of shares held or owned by the said James A. Ownbey in the said the Wootten Land and Fuel Company, with the numbers or other marks distinguishing the same.

3. That said Wootten Land and Fuel Company, while a corporation of the State of Delaware, is engaged in coal mining and all other of its activities and business in the State of Colorado and New Mexico, where it has much and valuable property, and is not or never has been engaged in business in the State of Delaware.

30 4. That James A. Ownbey is a resident of the State of Colorado and that the stock in the said the Wootten Land and

Fuel Company which has been attached in this case, constitutes substantially all of his property assets and estate.

5. That a suit was instituted in the United States District Court for the District of Colorado in the month of February 1915, by the plaintiffs in this cause and Francis H. McKnight, a person under the control of the said executors of John Pierpont Morgan, deceased, against the Wootten Land and Fuel Company, this defendant and other persons, praying for an accounting by this defendant, who has been the General Manager of said Wootten Land and Fuel Company, and the appointment of a Receiver for said Company. And in said cause a receiver for said Company was duly appointed and certain matters therein referred to a master to take testimony. That the Master is still engaged in taking testimony in said cause and the Receiver so appointed is now in possession and control of the property of the said the Wootten Land and Fuel Company; That by reason of the premises the market value of the shares of said company owned by this defendant and attached as aforesaid has been temporarily destroyed, although in fact of great value, so that the defendant had found said shares unavailable to assist him in securing required bail or security to procure the discharge of said shares from said attachment.

6. That by reason of the premises, the defendant has found it impossible and avers it is impossible to secure bail or security in the said sum of Two hundred thousand dollars, (\$200,000) or in any adequate sum for the release of his shares in said Wootten Land and Fuel Company, attached in this case.

7. That the defendant in the above stated case has a good defense to the whole of any cause of action stated in said suit, the nature of which defense is that there exists no indebtedness upon any account or for any sum or sums of money whatsoever, due to said plaintiffs or their decedent, the said John Pierpont Morgan, from said defendant either at this time or at the time said suit was instituted.

31 8. That the said writ of foreign attachment, issued as original process in said cause, is a remedy existing under and defined and limited by the Statutes of the State of Delaware, in that behalf; That said Statutes, upon due interpretation or construction thereof, provide:

a. That entry of the bail or security for the discharge of the property seized under such writ of foreign attachment is not a necessary pre-requisite for the entry of appearance by the defendant in such writ;

b. That the entry of appearance by the defendant in the said writ may be made without disturbing the seizure of property thereunder or its security for any judgment finally entered in the suit.

c. That the purpose of this writ of foreign attachment is two-fold, to-wit; To compel the appearance of the defendant in the cause and to devote or apply the value of the property attached to the judgment, if any, obtained in the suit begun by such process.

d. Where, in any case, appearance had been entered by the defendant, and pleas filed, no judgment can be entered until the trial of the issue so raised in said cause.

9. If the statutes of the State of Delaware, relating to foreign attachments, cannot be duly construed so as to permit appearance and defense, in the case of a cause begun by foreign attachment, without the entry of bail or security for the discharge of the property seized under such writ, such statutes are unconstitutional under the first section of the Fourteenth Amendment of the Constitution of the United States, in that:

a. Such statutes are laws abridging the privilege and immunities of citizens of the United States.

b. Such statutes deprive parties defendant in cases brought thereunder of property without due process of law.

c. Such statutes deny such defendants the equal protection of the Laws.

10. To require the defendant in this cause to give bond in the sum of \$200,000, or in any sum adequate to secure the payment of the amount of moneys claimed by plaintiff, therein, or to procure the dissolution of said attachment and the release therefrom of the shares of stock so attached, as a condition precedent to the allowance of an appearance and entry of pleas in bar, in said cause, by said defendant, is oppressive, unreasonable and in violation of fundamental principles for the administration of Justice.

JAMES A. OWNBREY,
By WARD, GRAY & NEARY,
His Attorneys.

WARD, GRAY & NEARY,
Attorneys for Defendant.

STATE OF COLORADO,
City and County of Denver, ss:

Be it remembered that on this seventeenth day of March, 1916, personally appeared before me a Notary Public for the State of Colorado, for the City and County aforesaid, James A. Ownbey, who being by me duly qualified according to law, deposes and says that he is the defendant in the above entitled action; That the facts herein set forth in this, his reply to a certain motion made therein, are true to the best of his knowledge and belief.

JAMES A. OWNBREY.

Sworn and subscribed to before me the day and year first above written.

[SEAL.]

I. ANSON WEST,
Notary Public, City and County of Delaware.

My commission expires November 8, 1919.

March 23d, A. D. 1916.—On motion of Ward, Gray & Neary, Esqs., time for argument on the above motion was further enlarged to Monday, March 27th, A. D. 1916.

March 27th, A. D. 1916.—Petition of Saulsbury, Morris & Rodney, Esqs., to strike out Appearance and said paper writing containing pretended reply to Plaintiff's motion.

33 In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNEY.

Foreign Attachment.

It appearing that Ward, Gray & Seary, Esqs., as alleged attorneys for said defendant, did on the twenty-first day of March, 1916, deliver to the Prothonotary of this Court a paper writing containing a pretended reply to plaintiffs' motion to strike off appearance and pleas of the said James A. Ownbey; and

It further appearing that the said Prothonotary did mark said paper writing "Filed" and did make entry in Appearance Docket containing the proceedings in said Attachment in the words and figures following, to-wit:

"March 21, 1916. Reply to plaintiffs' motion to strike appearance and defense filed"; and

It further appearing that special bail or security required by the Statute of the State of Delaware in suits instituted by Writs of Attachment had not and has not been given or entered in said Attachment by the said defendant, or any person for him,

The plaintiffs in the above stated Attachment by Saulsbury, Morris & Rodney, their attorneys, move that said entry made in the Appearance Docket as aforesaid be stricken out and that said paper writing containing pretended reply to Plaintiffs' motion be stricken from the files of this Court.

SAULSBURY, MORRIS & RODNEY,

Attorneys for Plaintiffs.

March 27th, A. D. 1916.—Saulsbury, Morris & Rodney, Esqs., move for judgment for want of appearance.

34 On this twenty-seventh day of March, A. D. 1916, it appearing that James A. Ownbey, the defendant, has not entered special bail in the above stated attachment.

John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the last Will and Testament of John Pierpont Morgan, deceased, plaintiffs in the above stated attachment, by Saulsbury, Morris & Rodney, their attorneys,

now move at this the second term after issuing the writ, for judgment, collectible from the property attached, pursuant to Sections 20 and 28, Chapter 126, being Sections 4137 and 4145, of the Revised Code of the State of Delaware;

And further, that the amount of said judgment be ascertained by inquisition at Bar.

SAULSBURY, MORRIS & RODNEY,
Attorneys for Plaintiffs.

April 5th, A. D. 1916.—Motion of Saulsbury, Morris & Rodney, Esqs., to strike out appearance and docket entries, and order of the Court on above motion.

In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

vs.

JAMES A. OWNBEY.

Foreign Attachment Case.

And now to-wit: This fifth day of April, A. D. 1916, the motions of Saulsbury, Morris & Rodney, Attorneys for the plaintiffs in the foregoing Attachment to strike out attempted appearance of Ward, Gray & Neary, Esquires, for the said defendant; certain entries made in the appearance docket by the Prothonotary; from files of this Court certain paper writings, and for judgment in the foregoing attachment, having come on to be heard, and maturely considered; and

It appearing that the Appearance Docket of this Court for the year 1916 that Ward, Gray & Neary, Esquires, Attorneys of this Court, have written their names opposite that of the above named defendant in said case in said Docket in the manner in which appearances for defendants in suits instituted by summons are usually entered; and

It further appearing that said Ward, Gray & Neary, Esqs., as alleged Attorneys for said defendant did on the second day of March, A. D. 1916 deliver to the Prothonotary of this Court a paper writing containing pretended pleas of the defendant to the declaration filed in the above stated case by the said plaintiffs; and

It further appearing that said Prothonotary did mark said paper writing "Filed" and did make entry in said Appearance Docket in words and figures following, to-wit:

"March second, 1916.—Defendant pleads with copy.
Non Assumpsit.

Statute of Limitations.

Payment.

Rule reps and issues by second general rule day in March."

It further appearing that Ward, Gray & Neary, Esqs., as alleged attorneys for said defendant, did on the twenty-first day of March, 1916 deliver to the Prothonotary of this Court a paper writing containing a pretended reply to plaintiffs' motion to strike off appearance and pleas of the said James A. Ownbey; and

It further appearing that the said Prothonotary did mark said paper writing "Filed" and did make entry in the Appearance Docket containing the proceedings in said Attachment in words and figures following, to-wit: "March 21st, A. D. 1916. Reply to plaintiffs' motion to strike off appearance and defense filed"; and

It further appearing that the said Writ of Attachment was instituted to the January Term of this Court; and

It further appearing that special bail or security required by the Statute of the State of Delaware in suits instituted by Writs of Attachment, has not been given or entered in said Attachment
36 by the said defendant, or any person for him;

It is ordered by the Court, That said attempted appearance of Ward, Gray & Neary, Esqs., for said defendant and the said docket entries made by the Prothonotary as aforesaid be stricken out, and that said paper writings containing pretended pleas and reply to plaintiffs' motion, marked "Filed" by the Prothonotary as aforesaid, be stricken from the files of this Court; and

It is further ordered, That Judgment for want of an appearance, collectible only from property attached, be entered in favor of the said plaintiffs and against the said defendant, and further that the amount of said Judgment be ascertained by inquisition at bar.

JAMES PENNEWILL, C. J.

April 5th, A. D. 1916.—On motion of plaintiffs' attorney judgment for want of an appearance in favor of the plaintiffs and against the defendant, collectible only from the property attached, the amount to be ascertained by Inquisition at bar.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

vs.

JAMES A. OWNBEY.

S., M. & R.

W., G. & N.

Foreign Attachment Case.

April 5th, A. D. 1916.

On motion of plaintiffs' Attorneys, Judgment for want of an Appearance in favor of plaintiffs and against defendant, collectible only

from property attached, the amount to be ascertained by inquisition at Bar.

Amount ascertained by inquisition at Bar \$200,168.57, besides costs, etc. Judgment Docket S, Vol. 3, page 277.

May second, A. D. 1916.—Petition to open Judgment.

The Petition of James A. Ownbey, of the Town of Boulder, County of Boulder and State of Colorado, respectively represents:

That at the March Term A. D. 1916, of this Court, a Judgment upon foreign attachment proceedings in the above entitled cause was entered against your petitioner (the defendant in said cause)
37 for want of an appearance, said Judgment being of record in the office of the Prothonotary of this Court.

That the Writ of Foreign Attachment upon which said judgment was obtained was issued out of this court December 23rd, 1915, the same being No. 46 to the January Term, 1916 of this Court. That your petitioner had no notice or knowledge of the said proceedings nor of the issuance of the said writ of foreign attachment, until sometime the latter part of the month of January, 1916. That thereupon your petitioner came immediately to Wilmington, Delaware, and retained counsel. He informed them that he had a full and complete defense to the demand in said suit and instructed them to enter an appearance for him and prepare his case to meet the issues presented upon their merits at a fair and full trial before this Court. That his counsel informed him that it had been the general practice in the State of Delaware to enter bail for the amount marked by the attorney for the plaintiff on the præcipe in a suit of foreign attachment before entering upon a defense, and after examination of the record of said case he was further informed by his counsel that the bail demanded was the sum of Two hundred thousand dollars.

That the property attached was all the shares of stock owned by your petitioner in the Wootten Land and Fuel Company, a Corporation of the State of Delaware, and that the number of such shares was thirty-three thousand three hundred twenty-four and one-third of the par value of Five Dollars each. That the said shares of stock represented substantially the entire property and assets of your petitioner, and, in the opinion of your petitioner, were and are of great value, to wit, of a value of upwards of Four hundred thousand dollars.

That a suit was instituted in the United States District Court for the District of Colorado, in the month of February, 1915, by the plaintiffs in this cause, together with one Francis H. McKnight, against the said Wootten Land and Fuel Company, your petitioner, and other persons, praying for an accounting by your petitioner, who

38 had been general manager of the said Wootten Land and Fuel Company, and the appointment of a Receiver for said Company. In said case a Receiver for said company was duly appointed and certain matters therein were referred to a Master to take testimony. That the Master is still engaged in taking testimony in said cause and the Receiver so appointed is now in possession and control of the property of the said Wootten Land and Fuel Com-

pany. That by reason of the premises the market value of the shares of said company owned by your petitioner and attached, as aforesaid, has been temporarily destroyed, so that, from the time of the attachment of said shares in this cause down to this time and at present, it is not possible to ascertain any certain value of said shares, and, as your petition avers, no value less than the said sum of Two hundred thousand dollars, demanded as bail in the above cause.

That immediately upon being advised by his counsel at Wilmington of the desirability of securing and entering bail in the above cause in the sum of Two hundred thousand dollars, your petitioner used every possible effort to secure the same in Washington, New York, Chicago, Denver and Boulder, Colorado, the home of your petitioner.

That your petitioner endeavored to secure surety companies, banks and other financial institutions, and individuals to enter bail for him in this action, and give him, without question, the right to make his defense thereto, and your petitioner offered to assign all of his stock in the Wooten Land and Fuel Company, so attached, together with everything else that he had in the world, as collateral security, to indemnify such surety, but that, owing to the premises and that the fact a receiver is now in possession of the property of the said Wooten Land and Fuel Company, your petitioner found it absolutely impossible to secure any surety in this cause, although your petitioner continued his efforts to secure such surety up until the time of the rising of this Honorable Court at the end of the March Term thereof. At which time, upon motion by the attorneys for the plaintiff, judgment was entered, as appears from the records of this Honorable Court, upon the fifth day of April, 1916, for want of an
39 appearance, and with the further order that the amount of said judgment be ascertained by inquisition at bar.

That among those whom your petitioner asked to enter bail, or to aid him in securing bail, in this action, were the American Surety Company, National Surety Company, Maryland Casualty Company, Illinois Trust and Savings Bank, at Chicago, the Boulder National Bank, at Boulder, Colorado, Honorable Robert L. Owen, United States Senator, and various and sundry other individuals and financial institutions. That your petitioner found it as above stated, an absolute impossibility to secure bail for anything like the amount demanded in this case, and being advised by his counsel that it was proper and right in the matter to do so, and for the purpose of submitting himself to the jurisdiction of this court, to try the merits of said cause, did, through his said counsel, attempt to enter an appearance and plead in the said cause, but even after the entry of such appearance and pleas by your petitioner's counsel your petitioner did not desist in his endeavor to secure bail, but, on the contrary, continued his endeavors so to do (though without success) until the rising of this court at the March Term thereof, and the entry of judgment against your petitioner, as above recited.

That upon motion of the attorneys for the plaintiffs in this case, the attempt of your petitioner, through his attorneys, to enter an appearance and file pleas in this cause, and submit himself to the

jurisdiction of this court for the determination of the merits of said cause, was denied by the Court and the said appearance was ordered to be stricken from the record and the said pleas stricken from the file of this cause.

That your petitioner is not now, nor was he at the time of the issuance of the said writ of foreign attachment, indebted to the said plaintiff in this cause in any amount whatsoever. That your petitioner has a just and legal defense to the whole of the cause of action in the said suit.

40 That the plaintiffs in this cause pretended to sue as executors of the last will and testament of John Pierpont Morgan, deceased, but, as your petitioner is advised and therefor avers, at no time up to the entering of said judgment, or hitherto, did the said plaintiffs in this cause produce to this Honorable Court under the seal of office or court granting the same, their letters testamentary, showing their authority as executors as aforesaid, nor did the plaintiffs cause such Letters to be recorded in the office of the Register of Wills in any one of the counties of this State, and, as your petitioner is advised and therefor avers, the said plaintiffs, not having produced their Letters as aforesaid; nor recorded the same as aforesaid under the seal of the office or court granting the same, had no standing in this Honorable Court, and this Honorable Court was without jurisdiction to enter judgment in this cause.

Your petitioner, therefore, averring that if he be not permitted to appear and defend the above stated action upon its merits he will be subjected to great and intolerable hardship, injustice and inequity, prays this Honorable Court that the said judgment may be opened and that he may be permitted to appear in this Court and disprove or avoid the said debt or claim.

And he will ever pray, etc.

JAMES A. OWNBEY.

STATE OF COLORADO,

City and County of Denver, ss:

Be it remembered, That on this 25th day of April, A. D. 1916, personally appeared before me, George C. Manly, a Notary Public for the State of Colorado, James A. Ownbey, the petitioner above named, who having been by me first qualified according to law, deposes and says that he is the petitioner above named, and that the facts set forth in said petition are true, to the best of his knowledge and belief, except as to such facts as are stated, that he has been advised of and as to such facts he verily believes the same to be true.

JAMES A. OWNBEY.

41 Sworn to and subscribed before me the day and year above written.

My Commission expires February 3rd, 1917.

[SEAL.]

GEORGE C. MANLY,

Notary Public.

May second, A. D. 1916.—Rule to show cause issued.

In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

vs.

JAMES A. OWNBEE.

Foreign Attachment Case.

And now, to wit, this second day of May, A. D. 1916, petition and affidavit filed, and on motion of Ward, Gray & Neary, Esqs., Rule granted upon John Pierpont Morgan, et al., Executors, to show cause why judgment in the above stated case, should not be opened, and that said defendant be permitted to appear in this Court and disprove or avoid the said debts or claim.

Returnable on Wednesday, the twenty-fourth day of May, A. D. 1916, at 10.00 o'clock, A. M.

May 18th, A. D. 1916.—Sheriff returns above mentioned Rule.

Made known personally to Saulsbury, Morris & Rodney, Attorney, May 18th, 1916.

So Ans.

HARRY J. STIDHAM, *Sheriff*.

May 18th, A. D. 1916.—On application of H. H. Ward, Esq., the Court enlarged the time for the return of the Rule to Wednesday, May 24th, A. D. 1916, at 10 o'clock, A. M. and the Sheriff was directed to serve the writ on the attorneys of record, with the understanding that it would not prejudice said attorneys of record
42 in their right to move to quash the return of said writ on the ground of illegal service.

May 25th, A. D. 1916.—Motion of Saulsbury, Morris & Rodney, Esqs., to set aside Sheriff's return to aforesaid Rule on the ground of illegal service.

In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment.

To the Honorable the Judges of the Superior Court of the State of Delaware in and for New Castle County:

It appearing from the records of this Court that Ward, Gray & Neary, Esqs., as alleged attorneys for the said defendant did on the second day of May, A. D. 1916 present to this Honorable Court a paper writing containing alleged reasons for opening the judgment entered in said proceeding on the fifth day of April, A. D. 1916, and move for Rule upon said plaintiffs to show cause why the said judgment should not be opened and said defendant be permitted to appear in this Court and disprove or avoid the said debts or claim; and

It further appearing that a Rule was thereupon issued returnable on the Sixteenth day of May, A. D. 1916; and

It further appearing that on the eighteenth day of May, A. D. 1916, on the application of H. H. Ward, Esq., this Honorable Court enlarged the time for the return of the Rule to Wednesday the twenty-fourth day of May at ten o'clock A. M. and the Sheriff was directed to serve the Writ on the Attorneys of Record, with the understanding that it would not prejudice said Attorneys of record in their right to move to quash the return of said Writ on the ground of illegal service; and

43 Whereas the Sheriff of New Castle County made the return of service on said rule as follows:

"Made known personally to Saulsbury, Morris & Rodney, Attorney- May 18th, 1916.

So Ans.

HARRY J. STIDHAM, Sheriff."

On this twenty-fifth day of May, A. D. 1916, Saulsbury, Morris & Rodney, Attorneys of Record for the plaintiffs in the Foreign Attachment proceedings instituted in this Court, being No. 46 to the January Term, 1916, do *respectively* petition this Honorable Court for permission to appear specially in obedience to said Rule for the said John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John

Pierpont Morgan, Deceased, for the purpose of moving to quash and set aside the return of the Sheriff of New Castle County on the said Rule on the ground of illegal service.

SAULSBURY, MORRIS & RODNEY.

And now, to-wit: This 25th day of May, A. D. 1916, the above petition having been presented, read and considered by the Court,

It is ordered by the court here that permission be granted Saulsbury, Morris & Rodney, Esqs., the Petitioners as aforesaid, to appear as requested therein.

JAMES PENNEWILL, C. J.

WM. H. BOYCE, J.

HENRY C. CONRAD, J.

May 25th, A. D. 1916.—Leave having been granted Saulsbury, Morris & Rodney, Esqs., to appear as above, thereupon moved to quash the rule and set aside the Sheriff's return on the ground of illegal service.

In the Superior Court of the State of Delaware in and for New Castle County.

44 No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment.

And now, to-wit: this twenty-fifth day of May, A. D. 1916, leave having been granted by the Court to Saulsbury, Morris & Rodney, Esqs., for permission to appear specially in obedience to rule issued for the said John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, for the purpose of moving to quash and set aside the return of the Sheriff of New Castle County on the said Rule, on the ground of illegal service, the said John Pierpont Morgan, Herbert L. Satterlee, William P. Hamilton and Lewis C. Ledyard, as Executors as aforesaid, by Saulsbury, Morris & Rodney, their attorneys move that the return of the Sheriff of New Castle County on the said rule be quashed and set aside on the ground of illegal service.

SAULSBURY, MORRIS & RODNEY.

May 25th, A. D. 1916.—Motion of Saulsbury, Morris & Rodney, Esqs., that petition of Ward, Gray & Neary, Esqs., presented to the Court May second, 1916, be stricken from the files of this Court,

the rule to show cause issued as aforesaid be discharged, and that the order directing the issuance of said Rule be vacated.

In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment.

45 It appearing that this Honorable Court did on the fifth day of April, A. D. 1916, make an order in the above entitled proceeding in part as follows:

"It is further ordered that judgment for want of appearance, collectible only from the property attached be entered in favor of the said plaintiffs against the said defendant and further that the amount of said judgment be ascertained by Inquisition at Bar;" and

It further appearing that said judgment was thereafter entered in Judgment Docket S, Volume 3, page 277, as follows:

"January Term, 1916, No. 46."

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

S., M. & R.

Foreign Attachment Case.

April 5th, A. D. 1916.

On motion of plaintiffs' attorney, Judgment for want of an appearance in favor of plaintiffs and against defendant, collectible only from property attached, the amount to be ascertained by Inquisition at Bar."

It further appearing that the amount of said judgment, has not yet been ascertained; and

It further appearing that Ward, Gray & Neary, Esquires, as alleged attorneys for said defendant, did on the second day of May,

A. D. 1916 present to the court a paper writing containing alleged reasons for opening said judgment and moved for a rule upon said plaintiffs to show cause why the judgment in the above stated case should not be opened and said defendant be permitted to appear in this Court and disprove or avoid the said debts or claim; and

It further appearing that rule was thereupon issued returnable on the sixteenth day of May A. D. 1916; and

It further appearing that the Prothonotary did mark said paper writing "Filed May second, 1916;" and

It further appearing that the said Prothonotary did thereupon make an entry in the appearance docket containing the record of said cause as follows:

46 "And now to wit, this second day of May, A. D. 1916 petition and affidavit filed and on motion of Ward, Gray & Neary, Esquires, Rule Granted upon John Pierpont Morgan et al. Executors, to show cause why the judgment in the above stated case should not be opened, and that the said defendant be permitted to appear in this Court and disprove or avoid the said debts or claim," and

It further appearing that the said defendant had not on the second day of May A. D. 1916 and has not at any time since, entered a general appearance in said cause or obtained leave of Court to enter a special appearance in said proceeding.

The plaintiffs in the above stated judgment by Saulsbury, Morris & Rodney, their attorneys, move that said paper writing be stricken from the files of this Court; the rule to show cause issued as aforesaid, be discharged; and that the Order directing the issuance of said Rule be vacated.

SAULSBURY, MORRIS & RODNEY,
Attorneys for Plaintiffs.

And, now, to-wit: this twenty-fifth day of May A. D. 1916.

It is ordered by the court, that Saulsbury, Morris & Rodney, Attorneys for the Plaintiffs be, and they hereby are permitted and granted leave to make and file the foregoing motion without prejudice to the rights of the said plaintiffs under their motion to quash and set aside the return of the Sheriff of New Castle County on the said Rule on the ground of illegal service.

JAMES PENNEWILL, C. J.
WM. H. BOYCE, J.
HENRY C. CONRAD, J.

May 25th, A. D. 1916.—Petition to discharge Rule for Insufficiency of petition.

In the Superior Court of the State of Delaware in and for New Castle County.

47

No. 46, January Term, 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBKEY.

Foreign Attachment.

And the said Plaintiffs by Saulsbury, Morris & Rodney, their attorneys, move that the rule, granted on the second day of May, A. D. 1916, upon the Plaintiffs in said Judgment to show cause why said Judgment should not be opened, be discharged, in that the matters set forth in the Petition praying for the opening of said Judgment are not sufficient to authorize the opening of said judgment as prayed in said Petition.

SAULSBURY, MORRIS & RODNEY.

And now, to-wit: this twenty-fifth day of May, A. D. 1916.

It is ordered by the court that Saulsbury, Morris & Rodney, Attorneys for the Plaintiffs, be and they are hereby permitted and granted leave to make and file the foregoing motion without prejudice to the rights of the said plaintiffs under their motion to quash and set aside the return of the Sheriff of New Castle County on the said Rule on the ground of illegal service; also without prejudice to the rights of the said plaintiffs under their motion that the said Petition be stricken from the files of this Court, to discharge the rule to show cause and to vacate the Order directing the issuance of said rule.

JAMES PENNEWILL, C. J.

WM. H. BOYCE, J.

HENRY C. CONRAD, J.

May 25th, A. D. 1916.—Motion of Saulsbury, Morris & Rodney, to quash and set aside Sheriff's returns; to strike said Petition from the files of this Court, and to discharge said Rule.

48 In the Superior Court of the State of Delaware in and for
New Castle County.

No. 46, January Term, 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SAT-
TERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John
Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment.

And now, to-wit: this twenty-fifth day of May A. D. 1916 the fol-
lowing motions of Saulsbury, Morris & Rodney, Attorneys for the
plaintiffs, having been read and filed.

1. To quash and set aside the Return of the Sheriff of New Castle
County on the Rule issued in the above stated proceeding, on the
ground of illegal service;

2. To strike said Petition from the files of this Court; that the
rule to show cause be discharged and that the Order directing the
issuance of said Rule be vacated; and

3. That the said Rule be discharged in that matters set forth in
the petition praying for the opening of said Judgment are not suffi-
cient to authorize the opening of said Judgment as prayed in said
Petition; the second motion aforesaid having been filed, without prej-
udice to the rights of the said Plaintiffs under the first motion, and
the third of said motions having been filed without prejudice to the
rights of the plaintiffs under the first and second motions aforesaid.

It is considered by the Court that the questions of law therein con-
tained ought to be decided by the Court in Banc, and it is therefor,
on the application of the said plaintiffs.

Ordered by the court, and they do hereby direct that the same be
heard by the Court in Banc.

JAMES PENNEWILL, C. J.
WM. H. BOYCE, J.
HENRY C. CONRAD, J.

May 25th, A. D. 1916.—Argument on motions before Court in Banc.

49 In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

In the matter of the rule to show cause why the Judgment entered in the above stated case should not be opened, and the defendant let into trial, the Court are of the opinion that the rule should be discharged. Our decision of this question makes it unnecessary to express any opinion upon the other points certified to the Court in Banc.

It is ordered that the foregoing opinion be and it hereby is certified to the Superior Court, for New Castle County.

JAMES PENNEWILL, C. J.

WM. H. BOYCE, J.

HENRY C. CONRAD, J.

HERBERT L. RICE, J.

T. B. HEISEL, J.

May 29th, A. D. 1916.—Motion of Saulsbury, Morris & Rodney, to quash and set aside Sheriff's returns; to strike said Petition from the files of this Court, and to discharge said Rule.

In the Superior Court of the State of Delaware in and for New Castle County.

No. 46, January Term, 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment.

And now, to-wit: this twenty-ninth day of May, A. D. 1916 the opinion of the Court in Banc upon the motion of Saulsbury, Morris & Rodney, attorneys for the said plaintiffs:

(a) To quash and set aside the Return of the Sheriff of New Castle County on the Rule issued in the above stated proceeding, on the ground of illegal service;

(b) To strike said Petition from the files of this Court; that the rule to show cause be discharged and that the Order directing the issuance of said Rule be vacated; and

(c) That the said Rule be discharged in that matters set forth in the Petition praying for the opening of said Judgment are not sufficient to authorize the opening of said Judgment as prayed in said Petition;

Having been duly certified to this Court, in accordance therewith, It is now ordered that the said rule be and it hereby is discharged.

JAMES PENNEWILL, C. J.

WM. H. BOYCE, J.

HENRY C. CONRAD, J.

Inquisition of Damages at Bar.

STATE OF DELAWARE,
New Castle County, ss:

Superior Court.

No. 46, January Term, A. D. 1916.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBREY.

An inquisition made, taken and returned, in open Court before the Superior Court of the State of Delaware, at Wilmington, in and for the County of New Castle, on the twenty-ninth day of May in the year of our Lord One Thousand Nine Hundred and Sixteen, by virtue of an order made by the said Court, in the nature of a writ of inquiry, upon an interlocutory judgment given by the said Court against James A. Ownbey, the defendant in a certain proceeding there depending, in which John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the estate of John Pierpont Morgan, deceased, are plaintiffs; by virtue of which said order, William K. Price, John C. Kersey, Thomas T. Weldin, Robert P. Fletcher, Edward V. Platt, Samuel C. Derrickson, Thomas C. Casey, John Trimble, Joseph Bradley, Richard T. Cann, Jr., Ellwood Stayton, Michael Keegan, Jr., twelve good and lawful men of the said County, being a jury attending at the next Court, after the said interlocutory judgment was given, and being charged, upon their respective oaths and affirmations, diligently to inquire what damages the said plaintiffs as Executors aforesaid, have sustained by reason of the non-performance of the promises

and undertakings of the said defendant in the declaration mentioned; they, the jurors aforesaid, upon diligent inquiry made, and evidence given in open Court, on their respective oaths and affirmations aforesaid, do say that the said plaintiffs as Executors as aforesaid have sustained damages, by reason of the non-performance of the said promises and undertakings of the said defendant, to the value of Two Hundred Thousand, One Hundred and Sixty-eight Dollars and Fifty-seven Cents (\$200,168.57); and also six cents costs, besides the costs by the said plaintiffs expended about their said suit.

In testimony whereof, the jurors aforesaid, to this inquisition, have severally set their hands and seals the day and year aforesaid.

W. K. PRICE, <i>Foreman</i> .	[SEAL.]
JOHN C. KERSEY.	[SEAL.]
THOMAS T. WELDIN.	[SEAL.]
ROBERT T. FLETCHER.	[SEAL.]
EDWARD V. PLATT.	[SEAL.]
SAMUEL C. DERRICKSON.	[SEAL.]
THOS. C. CASEY.	[SEAL.]
JOHN TRIMBLE.	[SEAL.]
JOSEPH BRADLEY.	[SEAL.]
RICHARD T. CANN, JR.	[SEAL.]
ELLWOOD M. STAYTON.	[SEAL.]
MICHAEL KEEGAN, JR.	[SEAL.]

The above Judgment was entered in Judgment Docket S, Volume 3, page 277.

And now, to-wit: this twenty-seventh day of November, 52 A. D. 1916, on motion of plaintiff's attorneys for an order to sell the shares of stock attached by virtue of the above writ, or so many shares as shall be sufficient to satisfy the debt, interest and costs of the judgment obtained upon the said writ;

It is ordered by the Court, that the said shares, or so many of these shares as shall be sufficient to satisfy the debt, interest and costs aforesaid, be sold at public sale to the highest bidder upon such notice as is required for sales upon execution process.

JAMES PENNEWILL, C. J.
WM. H. BOYCE, J.

November 29th, A. D. 1916.—Order of sale issued.

NEW CASTLE COUNTY,
State of Delaware, ss:

[SEAL.]

To the Sheriff of New Castle County, Greeting:

Whereas, the writ of the State of Delaware of Foreign Attachment Case was issued out of the Superior Court of the State of Delaware in and for New Castle County, on the twenty-third day of December, A. D. 1915, at the suit of John Pierpont Morgan, William P. Hamil-

ton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, against James A. Ownbey, late of your County, yeoman, by all his goods and chattels, rights and credits, lands and tenements in whose hands or possession soever the same may be found within your bailiwick so that he be and appear before the Judges of our Superior Court at Wilmington on Monday, the third day of January then next, to answer John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the estate of John Pierpont Morgan, deceased, of a plea of trespass on the case, etc.

And that you summon the garnishee or garnishees to appear at the Court to which this Writ is returnable, then and there to declare what goods, chattels, rights, credits, money, or effects of the defendant or defendants, he, she or they hath or have in his, her or their hands, respectively: And have you then there this Writ.

And whereas, on the Third day of January, A. D. 1916, the same being the return day of the said writ, you made return thereof, to-wit:

Attached all of the shares of the capital stock of James A. Ownbey in the Wootten Land and Fuel Company, a Corporation of the State of Delaware, with all the rights thereto belonging, by leaving a certified copy of the within process with Arthur B. Smith, a Director of the said Company, on the twenty-third day of December, A. D. 1915 and received from the said Arthur B. Smith, director as aforesaid, the certificate hereto attached marked (A) and made part of this return, showing the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company, with the number and other marks distinguishing the same; also leaving a certified copy of the within process with Baldwin Springer, a director of the said The Wootten Land and Fuel Company, residing in the City of Wilmington, New Castle County and State of Delaware, on the first day of January, A. D. 1916, and received from the said Baldwin Springer, director as aforesaid, the certificate hereto attached marked (B) and made a part of this return showing the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company with the number or other marks distinguishing same.

So Ans.

HARRY J. STIDHAM, *Sheriff*.

(The above named certificates are in the words and figures following, to-wit:)

In the Superior Court of the State of Delaware in and for New Castle County.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

VS.

JAMES A. OWNBEY.

Foreign Attachment Case.

I, Arthur B. Smith, do hereby certify that I am a Director of The Wootten Land and Fuel Company, a Corporation of the State of Delaware, that the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company on the Twenty-third day of December, A. D. 1915, with the number, or other marks, distinguishing the same, are as follows:

Certificate number.	Number of shares.
25	5000
26	5000
34	5000
27	324½
28	500
29	500
30	1000
31	1000
32	2500
33	2500
35	10000

making a total of shares so held and owned by the said James A. Ownbey of 33,324½.

Dated December 24th, 1915.

ARTHUR B. SMITH,
Director of the Wootten Land and Fuel Company.

In the Superior Court of the State of Delaware in and for New Castle County.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased,

vs.

JAMES A. OWNBey.

Foreign Attachment Case.

I, Baldwin Springer, do hereby certify that I am a Director of The Wootten Land and Fuel Company, a Corporation of the State of Delaware; that I reside in the City of Wilmington, New Castle County, and state of Delaware; that the number of shares held or owned by the said James A. Ownbey in the said The Wootten Land and Fuel Company with the number, or other marks distinguishing the same, are as follows:

Certificate number.	Number of shares.
25	5000
26	5000
34	5000
27	324½
28	500
29	500
30	1000
31	1000
32	2500
33	2500
35	10000

55 making a total of shares so held or owned by the said James A. Ownbey of 33,324½.

Dated this First day of January, A. D. 1916.

BALDWIN SPRINGER,
*Director of the Wootten Land
and Fuel Company.*

And whereas, afterwards to-wit; On the twenty ninth day of May, A. D. 1916, the said John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the estate of John Pierpont Morgan, deceased, late of your County, in our Superior Court before the Judges thereof, at Wilmington, by the said Writ and by the Judgment of the Court recovered against the said James A. Ownbey, the said defendant, the sum of Two Hundred Thousand, One Hundred and Sixty-eight Dollars, and Fifty-seven Cents, besides costs, etc., which were adjudged for their damages, which they had by occasion of the non-performance of a

certain promise and assumption of the said John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, by the aforesaid James A. Ownbey, at the county aforesaid, whereof the said James A. Ownbey, was convicted as it appears of record.

And whereas, on the twenty-seventh day of November, A. D. 1916, on motion of the Plaintiffs' Attorney for an order to sell the shares of stock so attached as aforesaid or so much thereof as shall be sufficient to satisfy the damages, interest and costs of the said Plaintiffs in their cause. The said Court ordered and directed the said shares of stock so attached as aforesaid or so many as shall be necessary to satisfy the said Plaintiff, to be sold and the money retained, subject to the further order of the Court, etc.

Thereupon, we command you, that the said shares of stock aforesaid, or so many thereof as shall be sufficient so attached by virtue of the said writ of Foreign Attachment Case you cause to be sold on due notice, and have you the money before the Judges of our Superior Court at Wilmington, on Tuesday, the second day of January, next, and retain the same, subject to the further order of the Court, and this writ.

Witness, the Honorable James Pennewill, the sixth day of November, A. D. 1916.

Issued November 29th, 1916.

JOSEPH WIGGLESWORTH,
Prothonotary.

56 December 11th, A. D. 1915.—Writ and Assignment of Errors received and filed.

In the Supreme Court of the State of Delaware.

No. —, January Term, 1917.

JAMES A. OWNBEY, Defendant Below, Plaintiff in Error,

vs.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Plaintiffs Below, Defendants in Error.

Writ of Error to the Superior Court of the State of Delaware in and for New Castle County.

Assignments of Error.

And now comes James A. Ownbey, the Plaintiff in Error above named, by Ward, Gray & Neary, his Attorneys, and says that in the record, proceedings and judgment in the above stated cause, there is manifest error in the following, to-wit:

First. The Court below erred in making its order of the Fifth day of April, A. D., 1916, which after certain findings of fact, was as follows:

"It is ordered by the Court that said attempted appearance of Ward, Gray & Neary, Esquires, for said defendant, and the said docket entries made by the Prothonotary as aforesaid be stricken out and that said paper writings containing pretended pleas and reply to plaintiffs' motion marked 'Filed' by the Prothonotary as aforesaid, be
57 stricken from the files of this Court; and

It is further ordered that judgment for want of appearance, collectible only from the property attached, be entered in favor of the said plaintiffs and against the said defendant, and further that the amount of said judgment be ascertained by inquisition at bar."

in that the statutes of the State of Delaware, in supposed conformity to which the said order was made, and the proceedings thereunder in said cause are in violation of the Constitution of the United States, and void, because,

1. Thereby the said Ownbey, who was a citizen of the State of Colorado, was deprived of privileges and immunities of citizens of the several States, contrary to the second section of the fourth article of the Constitution of the United States;

2. Because thereby the privileges and immunities of Ownbey, who was a citizen of the United States, were and are abridged, contrary to the fourteenth amendment to the Constitution of the United States;

3. Because the said Ownbey, was and is thereby deprived of his property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States; and

4. Because the said Ownbey was thereby denied the equal protection of the laws, contrary to the fourteenth amendment of the Constitution of the United States.

Second. The Court below erred in the making of its said order of the Fifth day of April, A. D., 1916, whereby it struck out the record of said cause the appearance of the said James A. Ownbey, said defendant, by his Attorneys, and thereby prevented the
58 said defendant from making his defense against the claims of the plaintiffs in said cause, and thereupon entered judgment for want of said appearance in favor of said plaintiffs and against the said defendant, in that the statutes of the State of Delaware, in supposed conformity to which the said order was made, and the proceedings thereunder in said cause are in violation of the Constitution of the United States, and void, because,

1. Thereby the said Ownbey, who was a citizen of the State of Colorado, was deprived of privileges and immunities of citizens of the several States, contrary to the second section of the fourth article of the Constitution of the United States;

2. Because thereby the privileges and immunities of Ownbey, who was a citizen of the United States, were and are abridged, contrary to the fourteenth amendment to the Constitution of the United States;

3. Because the said Ownbey, was and is thereby deprived of his property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States; and

4. Because the said Ownbey was thereby denied the equal protection of the laws, contrary to the fourteenth amendment of the Constitution of the United States.

Third. The Court below erred in making its said order of the Fifth day of April, A. D. 1916, whereby it struck out from the record of said cause the appearance of said defendant, by his Attorneys, and struck from the files of said Court the paper writing containing the pleas of said defendant to the merits of said cause which the
59 defendant had filed in said cause, whereby the said Court prevented the said James A. Ownbey, said defendant below, Plaintiff in Error, from defending against the claims of the plaintiffs below, defendants in error, and thereupon ordered judgment to be entered in supposed default of appearance in said cause by said defendant below, plaintiff in error, in favor of said plaintiffs below, and against said defendant below, in that the statutes of the State of Delaware, in supposed conformity to which the said order was made, and the proceedings thereunder in said cause are in violation of the Constitution of the United States, and void, because,

1. Thereby the said Ownbey, who was a citizen of the State of Colorado, was deprived of privileges and immunities of citizens of the several States, contrary to the second section of the fourth article of the Constitution of the United States;

2. Because thereby the privileges and immunities of Ownbey, who was a citizen of the United States, were and are abridged, contrary to the fourteenth amendment to the Constitution of the United States;

3. Because thereby the said Ownbey, was and is deprived of his property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States; and

4. Because the said Ownbey was thereby denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Fourth. The Court below erred in making its said order of the Fifth day of April, A. D. 1916, which, after certain findings
60 of fact, was as follows:

"It is ordered by the Court that said attempted appearance of Ward, Gray & Neary, Esquires for said Defendant, and the said docket entries made by the Prothonotary as aforesaid be stricken out and that said paper writings containing pretended pleas and reply to plaintiffs' motion marked 'Filed' by the Prothonotary as aforesaid, be stricken from the files of this Court; and

It is further ordered that judgment for want of appearance, collectible only from the property attached, be entered in favor of the said plaintiffs and against the said defendant, and further that the amount of said judgment be ascertained by inquisition at bar."

in that the statutes of the State of Delaware, in supposed conformity to which the proceedings in such cause were had and the said order was made, and under which statutes the plaintiffs, upon their own affidavit or upon the affidavit of some credible person in their behalf, alleging the indebtedness of the defendant below to plaintiffs' decedent in a sum exceeding \$50.00, were authorized to mark on the Writ of Attachment thereupon issued, and to fix the amount of bail required in said cause at the sum of \$200,000.00, and thereupon to attach the property of said defendant below and prevent his entry of appearance in such attachment suit or the making of his defense therein to the claim of said plaintiffs, in default of the entry of said \$200,000.00 of bail in said cause, and thereupon to obtain interlocutory judgment, to ascertain the amount of such interlocutory judgment ex parte, and thereupon to obtain final judgment in such cause, and thereupon to obtain order of sale and make sale of the property so seized, all of which before the defendant below should have any opportunity to enter any appearance in said cause or make defense to the claim of said plaintiffs, in error, in default of his ability to furnish said bail in the sum of \$200,000.00, are against the common right of said defendant below and unconstitutional and void, because,

1. Thereby the said Ownbey, who was a citizen of the State of Colorado, was deprived of privileges and immunities of citizens of the several States, contrary to the second section of the fourth article of the Constitution of the United States;

2. Because thereby the privileges and immunities of Ownbey, who was a citizen of the United States, were and are abridged, contrary to the fourteenth amendment to the Constitution of the United States;

3. Because the said Ownbey, was and is thereby deprived of his property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States; and

4. Because the said Ownbey was thereby denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Fifth. The Court below erred in making its order of the 29th day of May, A. D. 1916, whereby it ordered that the rule be discharged which it had ordered to issue upon the petition and motion of the said James A. Ownbey, said defendant below, plaintiff in error, to show cause why the interlocutory judgment in favor of the said plaintiffs below and against the said defendant below, upon the supposed default of appearance by said defendant below in said cause, might not be opened and why he, the said defendant below, might not be permitted to appear in said court and disprove or avoid the debt or claim of the plaintiffs below in said cause, in that the said court did not exercise a just judicial discretion in the premises, which just judicial discretion would have led them to grant the prayer of said petition and motion of said defendant below.

Sixth. The Court below erred in making its order of the 29th day

of May, A. D. 1916, whereby it ordered that the rule be discharged which it had ordered to issue upon the petition and motion of the said James A. Ownbey, said defendant below, plaintiff in error, to show cause why the interlocutory judgment in favor of the said plaintiffs below and against the said defendant below upon the supposed default of appearance by said defendant below in said cause should not be opened, and why he, the said defendant below, should not be permitted to appear in said court and disprove or avoid the debt or claim of the plaintiffs below in said cause, in that the statutes of the State of Delaware and the proceedings thereunder, in supposed accordance with and upon which the said order was made, are against common right, in violation of the Constitution of the United States, and void, because,

1. Thereby the said Ownbey, who was a citizen of the State of Colorado, was deprived of privileges and immunities of citizens of the several States, contrary to the second section of the fourth article of the Constitution of the United States;

2. Because thereby the privileges and immunities of Ownbey, who was a citizen of the United States, were and are abridged, contrary to the fourteenth amendment to the Constitution of the United States;

63 3. Because the said Ownbey was and is thereby deprived of his property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States; and,

4. Because the said Ownbey was thereby denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Seventh. That the court below erred in making its order of the 27th day of November, A. D. 1916, that the rule be discharged which it had on the 29th day of May, A. D. 1916 issued, and to the plaintiffs below directed, upon the petition and motion of the said James A. Ownbey, said defendant below, to show cause why the final judgment entered in said cause might not be opened, why said defendant below might not be permitted to appear in said court and disprove or avoid the said debt or claim of said plaintiffs below, and also why said final judgment might not be vacated, in that the said court did not exercise a just judicial discretion in the premises, which just judicial discretion would have led them to grant the prayer of said petition and motion of the said defendant below.

Eighth. That the court below erred in making its order of the 27th day of November, A. D. 1916, that the rule be discharged which it had, on the 29th day of May, A. D. 1916, issued and to the plaintiffs below directed, upon the petition and motion of the said James A. Ownbey, the said defendant below, to show cause why the final judgment entered in said cause might not be opened, why

64 said defendant below might not be permitted to appear in said court and disprove or avoid the said debt or claim of said plaintiffs below, and also why the said final judgment should not be vacated, in that the statutes of the State of Delaware and the proceedings thereunder, in supposed accordance with and upon which

the said order was made, are against common right, in violation of the Constitution of the United States, and void, because,

1. Thereby the said Ownbey, who was a citizen of the State of Colorado, was deprived of privileges and immunities of citizens of the several States, contrary to the second section of the fourth article of the Constitution of the United States;

2. Because thereby the privileges and immunities of Ownbey, who was a citizen of the United States, were and are abridged, contrary to the fourteenth amendment to the Constitution of the United States;

3. Because the said Ownbey, was and is thereby deprived of his property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States;

4. Because the said Ownbey was thereby denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Ninth. The said court below erred in making its order of the 27th day of November, A. D. 1916, whereby it ordered and directed the shares of capital stock belonging to said defendant, of Wootten Land and Fuel Company, or so many thereof as should be sufficient to satisfy the debt, interest and costs of the judgment obtained upon the writ of foreign attachment in said cause, be sold at public vendue to the highest bidder, upon such notice as is required for sales

65 upon execution process, in that the statutes of the State of Delaware and the proceedings thereunder, in supposed conformity to which the said order was made, are against common right, in violation of the Constitution of the United States, and void, because,

1. Thereby the said Ownbey, who was a citizen of the State of Colorado, was deprived of privileges and immunities of citizens of the several States, contrary to the second section of the fourth article of the Constitution of the United States;

2. Because thereby the privileges and immunities of Ownbey, who was a citizen of the United States, were and are abridged, contrary to the fourteenth amendment to the Constitution of the United States;

3. Because the said Ownbey was and is thereby deprived of his property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States; and,

4. Because the said Ownbey was thereby denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Wherefore the defendant below, plaintiff in error, prays that the several orders, findings, awards and judgments of the Court below, and each of them, affected by the foregoing assignments of error or any of them, and the judgment of the Court below, may be reversed and held for naught.

WARD, GRAY & NEARY,
Attorneys for Defendant Below,
Plaintiff in Error.

66 STATE OF DELAWARE,
New Castle County, ss:

I, Joseph Wigglesworth, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, which Court is a Court of Record, do hereby certify: That the above and foregoing is a true and correct copy of the proceedings had in the case there stated, as the same remains of record in said Court at Wilmington.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this Fourteenth day of December, A. D. 1916.

[SEAL.]

JOSEPH WIGGLESWORTH,
Prothonotary.

67 In the Supreme Court of the State of Delaware.

No. 2, January Term, 1917.

JAMES A. OWNEY, Defendant Below, Plaintiff in Error,

VS.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Plaintiff Below, Defendant in Error.

1916, December 9th.—Writ of Error to the Superior Court of the State of Delaware, in and for New Castle County. Same day, Præcipe and Assignment of Error with copy received and filed. Same day, Writ of Error, Citation and copy of Assignment of Error delivered to the Sheriff of Kent County for service.

1916, December 9th.—Superseded-as Bond in the penal sum of Six Thousand Dollars with Fidelity and Deposit Company of Maryland as surety and approved by Chancellor Charles M. Curtis received and filed, and the Prothonotary of New Castle County notified, Sheriff Returns. Served the within citation on Hugh M. Morris, of the firm of Saubsbury, Morris & Rodney, Attorneys of record in the Superior Court of the State of Delaware, in and for New Castle County, being the Court below, of John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard as Executors of the Estate of John Pierpont Morgan, deceased, Plaintiff- below Defendants in Error, in the within mentioned cause (said Defendants being non-residents of the State of Delaware) personally on the 11th day of December, A. D. 1916. And the same day Writ of Error together with the assignment of error laid in the hands of Joseph Wigglesworth, Prothonotary in and for New Castle County.

1916, Dec. 23rd.—Præcipe for appearance of Saubsbury, Morris & Rodney counsels for John Pierpont Morgan et al. received and filed.

1917, January 2nd.—Certified copy of Record received and
68 filed.

1917, January 2nd.—Twenty printed Copies of Record received and filed.

1917, January 8th.—Motions of Saulsbury, Morris & Rodney Attys. for Plaintiff below Defendants in Error received and filed.

1917, Jan. Term, to-wit, 1917, Jan. 16th.—Arguments on motions continued to Feb. 21st 1917 and *preemptory* order issued that Briefs be filed on the motions by Plaintiff- below Defendants in error by Feb. 1st 1917, and Briefs in reply by Defendant below Plaintiff in error by Feb. 21st 1917.

1917, February 1st.—Typewritten copy and eleven printed copies of Brief of Plaintiff- below Defendants in error, received and filed.

1917, Feby. 28th.—Argument on motion continued, and the motion to be submitted to the Court on briefs.

1917, March 9th.—Eleven printed copies of supplemental Brief of Defendant- in error received and filed.

On this twentieth day of June A. D. 1917, the written motion of the Defendants in error filed in this Court, in the above stated cause, that the Plaintiff in error be required by the order of this Court to file within a reasonable time to be fixed by said order additional security to be approved by this Court, or a Judge thereof, in a sum of at least Two Hundred Thousand Dollars, that the Plaintiff in error shall prosecute his writ to effect and pay the condemnation money and all costs, or otherwise abide the Judgment in error if he fail to make his plea good, or in default thereof that the said writ of error shall be no stay of proceedings in the Court to which the said Writ was issued, having been duly argued by Counsel and considered by the Court.

It is ordered by the Court that the said motion be and it is hereby denied.

CHARLES M. CURTIS, *Chancellor.*
HENRY C. CONRAD, *J.*
HERBERT L. RICE, *J.*
T. B. HEISEL, *J.*

On this twentieth day of June A. D. 1917 the written motion of the said Defendants in error filed in this Court, that certain matters, words and papers set forth in said motion be stricken from the transcript of said cause certified to this Court by the Prothonotary of the

69 Court to which the said Writ of Error issued; and that said transcript be stricken from the files of this Court, and that said Prothonotary be directed by an order of this Court to make and transmit to this Court the transcript of the record of this cause in the Court below in conformity with the *order* of this Court on this motion, having been duly argued by Counsel and considered by the Court.

It is ordered by the Court, that the following portions of the said transcript be stricken therefrom as not properly parts thereof, viz:

(1) The petition of the Defendants below to open the final Judgment in the Court below and the entries, proceedings and orders re-

lating to said petition, being the matters, words and papers referred to in paragraph 18 of the said motion made in this Court by the Defendants in error and

(2) the matters, words and papers in the said transcript purporting to be a bill of exceptions and appearing on pages 62 to 102 inclusive of the printed record in this Court in this cause.

And it is further ordered by the court that the other portions of said motion be and the same are denied.

CHARLES M. CURTIS, *Chancellor.*

HENRY C. CONRAD, *J.*

HERBERT L. RICE, *J.*

1917, Oct. 23rd.—Continued to Nov. 15th 1917.

1917, Oct. 30th.—Twenty printed copies of Brief of Plaintiff in error, received and filed, same day three copies mailed to Saulsbury, Morris & Rodney.

1917, November 13th.—Twenty printed copies of Brief of Defendants in error received and filed, same day 3 copies mailed Ward, Gray & Neary.

1917, November 15th.—On motion of Herbert H. Ward, Esq., Louis Marshall, Esq. was admitted pro hac vice and case argued, H. H. Ward, Esq. asked leave to file supplemental briefs to submit to the Court, leave granted, and briefs to be filed by November 24th, and Defendant in error given ten days to file in answer after the 24th day of November 1917.

1917, Dec. 1st.—Three typewritten reply briefs from Defendants in error received, and one copy each mailed to Judges Conrad, Rice & Heisel.

70 And now to-wit: this 21st day of March A. D. 1919, the above cause having been duly argued by Counsel for the parties respectively.

And it appearing to the Court here that there is no error in the record and proceedings in said cause in the Superior Court of the State of Delaware, in and for New Castle County.

It is thereupon, adjudged and ordered, that the Judgment of said Court in said cause be and it is hereby affirmed, and that the Defendant below, Plaintiff in error, pay the costs of said cause in this Court, hereby taxed at the sum of Eighteen Dollars and Sixty Cents (18.60).

And further, that the Clerk of this Court remit to the said Superior Court a duly certified copy of this Judgment, with the opinion of this Court, filed in this cause, in order that such further proceedings may be had in said Court in said cause in conformity with this Judgment as may be necessary.

HENRY C. CONRAD, *J.*

HERBERT L. RICE, *J.*

T. B. HEISEL, *J.*

1919, Meh. 22nd.—Opinion of the Court received and filed.

1919, Meh. 24th.—Certified copy of this Judgement and opinion of the Court mailed Joseph Wigglesworth, Proy., Wilmington, Delaware.

STATE OF DELAWARE,
Kent County, ss:

I, Daniel M. Ridgely Clerk of the Supreme Court of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of the Docket Entries of the Supreme Court of the State of Delaware in the above stated case as the same appears of record in said Court at Dover this fifth day of April in the year of our Lord one thousand nine hundred and nineteen.

[Seal of the Supreme Court, Delaware.]

DANIEL M. RIDGELY,
Clerk of the Supreme Court.

71 STATE OF DELAWARE, ss:

I, Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware, being the highest Court of said State, do hereby certify that the above and foregoing is a true copy of the Record and of the Assignments of Error, and of all the proceedings had in the case there stated, as the same remains of record in said Court at Dover, Delaware; and further, that attached hereto is a copy of the Opinions filed in the case.

[Seal of the Supreme Court, Delaware.]

DANIEL M. RIDGELY,
Clerk of the Supreme Court of the State of Delaware.

72 In the Supreme Court of the State of Delaware.

No. 2, January Term, 1917.

JAMES A. OWNBEY, Defendant Below, Plaintiff in Error,

v.

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERRERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of John Pierpont Morgan, Deceased, Plaintiffs Below, Defendants in Error.

Writ of Error to the Superior Court of the State of Delaware in and for New Castle County.

73 PER CURIAM:

In this case there are nine assignments of error filed by the defendant below, appellant in error. Voluminous briefs were filed and

able and exhaustive arguments were made by counsel representing both parties to the action. However, as the judges comprising the Supreme Court at the time of the argument there were also members of the court en banc at the time that Court heard and determined the same questions raised by the assignments of error, and also in view of the fact that the same questions cannot arise in the future for the reason that by recent legislation defendants in foreign attachment cases are permitted to appear without first giving bail, we will not state reasons for our decision in this Court, our conclusions being the same as they were at the time the case was argued and determined by the Court en banc.

Without stating the numerous questions of law raised by the assignments of error and decided by the court below, we are of the opinion that the judgment of the court below should be and it is hereby affirmed.

74 The Opinion of the Court in Banc, referred to in the Opinion of the Supreme Court, is as follows:

Opinion of the Court In Banc upon Motion of Plaintiffs Below to Strike from the Record the "Attempted Appearance" for the Defendant Below, the Paper Writing Containing what Purported to be Defendant's Pleas, and the Entries upon the Record Relating Thereto.

PENNEWILL, C. J., delivering the opinion of the court:

On December twenty-third, 1915, a writ of foreign attachment was issued against the defendant at the suit of the plaintiffs, and the sheriff was directed, by endorsement on the writ, to summon as garnishee The Wooten Land and Fuel Company, and to take bail in the sum of two hundred thousand dollars. The writ was issued on the filing of the usual affidavit prescribed by the statute in such cases, viz: that the defendant was indebted to the plaintiff in a sum exceeding fifty dollars, and that the defendant resided out of the State of Delaware.

The sheriff's return shows that he attached all the shares of the capital stock of said corporation, with all the rights thereunto belonging, and received from the directors a certificate, made part of the return, showing the number of shares held or owned by the defendant to be thirty-three thousand three hundred and twenty-four and one-third.

On January seventeenth, 1916, a narr was filed by the plaintiff, and rule pleas by the first general rule day in February. The
75 declaration contained the common counts. There was no bill of particulars filed, but simply the date and amount of indebtedness.

On March second, 1916, counsel for the defendant, for the purpose and with the intent of entering an appearance for the defendant wrote their names opposite the name of the defendant where it appears in the statement of the case on the appearance docket of the court, and later on the same day delivered to the Prothonotary a

paperwriting containing defendant's pleas to the declaration of the plaintiff. This paper was marked "Filed" by the Prothonotary, who also made the following entry in said appearance docket: "March second, 1916, Defendant pleads, with copy, non-assumpsit, Statute of Limitations, Payment. Rule reps, and issues by second rule day in March."

On March thirteenth, 1916, a written motion was made and filed by plaintiff's counsel, asking that the appearance of defendant's counsel, and the entry thereof made by the Prothonotary be stricken out, and that said paper writing containing what purported to be pleas in said case, be stricken from the files of this court.

These are the material and undisputed facts in the case.

On March fourteenth, 1916, counsel for the defendant filed a paper in the nature of an answer to the motion of the plaintiffs, which in substance is as follows:

That said company, while a corporation of this state has never been engaged in business here—all its business and activities being in the States of Colorado and New Mexico. That the defendant is a resident of Colorado, and that the stock attached in this case constitutes substantially all of his property.

76 That a receiver has been appointed for said company by the United States District Court in Colorado, and the market value of said stock has been thereby temporarily destroyed, although in fact of great value, so that the defendant has found it impossible to secure the required bail to procure the discharge of his shares of stock from attachment.

That the defendant has a good defense to the whole of any cause of action stated in said suit, the nature of which is, that there exists no indebtedness whatsoever due to the said plaintiffs from the said defendant either at this time or at the time said suit was instituted.

That the entry of bail for the discharge of property seized under a writ of foreign attachment is not a necessary prerequisite for the entry of appearance by the defendant.

That the entry of appearance by the defendant may be made without disturbing the seizure of property thereunder, or its security for any judgment finally entered in the suit.

That the purpose of the writ of foreign attachment is two-fold, to wit: To compel the appearance of the defendant, and to devote or apply the value of the property attached to any judgment obtained in this action.

Where, in any case, appearance has been entered by the defendant, and pleas filed, no judgment can be entered until the trial of the issue so raised.

That under our foreign attachment statutes only those corporations that are doing business in this state can be summoned as garnishees.

If the statutes of this State relating to foreign attachment cannot be construed so as to permit appearance and defense in a foreign attachment case without entering bail or security for the discharge of the property attached, then such statutes are
77 unconstitutional under the first section of the fourteenth amendment

of the Constitution of the United States, in that they deprive parties defendant, in cases brought thereunder, of their property without due process of law.

That such statutes are also unconstitutional because they make an arbitrary, unreasonable and illegal classification of the persons affected by them.

To require the defendant to give bond in the sum of two hundred thousand dollars to procure the dissolution of said attachment and the release of the shares of stock attached, as a condition precedent to the allowance of an appearance and entry of pleas in bar by the defendant, is oppressive, unreasonable, and in violation of fundamental principles for the administration of justice.

Such is substantially the argument of counsel for the defendant, as contained in their brief.

The plaintiffs dispute, practically, every contention made by the defendant, and insist that he is not in court and cannot make any motion or defense because there can be no appearance in the case without entering special bail.

They rest their case upon the language of the statute and the uniform practice thereunder for more than a hundred years. They claim that never, before the present case, has anyone contended that an individual defendant could appear in a foreign attachment case without entering special bail. And, it is argued, while there is no express inhibition in the statute against it, the implication is as strong and conclusive as an express inhibition would be. Not only does the

78 providing of one means of appearance exclude any other, but the effect of appearing without entering special bail would take from the plaintiff every advantage of the attachment, and certainly the legislature did not intend that the statute should be so construed. If an appearance is entered without giving special bail the action becomes, from that moment, an action in personam and is no longer an action in rem; and it is further contended that any judgment recovered in the case after such appearance would be a general judgment, and the lien of the attachment lost. It is not conceivable that the defendant can by simply entering an appearance, deprive the plaintiffs of every advantage gained by their attachment.

The plaintiff's claim that a judgment cannot be entered after the second term, and this being the second term an appearance and trial would cause a continuance and make it impossible to recover any judgment at all under the statute. It is also claimed that the statute which provides that corporation doing business in this State may be summoned as garnishees, has no application to this case.

To the contention of the defendant that if an appearance cannot be entered without giving special bail, the statute is unconstitutional under the fourteenth amendment of the Constitution of the United States, because it deprives parties defendant of their property without due process of law, the plaintiffs reply, that the defendant is not deprived of an opportunity to make his defense. Under the statute he may appear and defend the action by giving security to the value of the property attached. This, it is argued, is not an arbitrary or

unreasonable requirement, but it is in fact the law of the land in many actions in rem.

79 We have stated substantially the plaintiff's argument as made in the case.

It is probably true, as plaintiffs aver, that never before has anyone contended that there could be an appearance in a foreign attachment suit against an individual without entering special bail.

This fact does not prove that such an appearance cannot be made, but it is of much significance, and necessarily has some weight with the court. But conceding that the practice has been long and uniform, the defendant argues that the question raised in this case has never been raised before, and that, therefore, it is a new question before the court. Moreover, the defendant says: A case like the present one has never been presented to the court before. The only distinguishing feature, however, is, that the amount of bail required is so large that it is impossible for the defendant to furnish it. We cannot regard that fact as sufficient to distinguish this case from others, because in every foreign attachment suit the ability of the defendant to furnish the security required to discharge the attachment depends very largely upon his financial condition. It might be as difficult and impossible for one person to give a small bond as for another to furnish a large one. The large amount of bail required in this case cannot, therefore, take it out of the general rule.

The court are clearly of the opinion that in a foreign attachment suit against an individual, there can be no appearance without entering special bail; indeed, the entering of bail constitutes defendant's appearance.

80 Defendant has produced no case in conflict with this conclusion; and while his reasoning based upon the language of the statute and the rights of defendants, is strong it is not convincing.

This case involves a construction of a statute of our own State, and cases from other jurisdictions cannot be of much assistance to the court in any event.

The defendant argues that the statute has a two-fold aspect, viz: 1. To compel an appearance; and 2, to give the plaintiff a lien on the property attached for the payment of his claim.

While we think the purpose of the statute was to accomplish both of those things, we do not think the two things are separate and independent. The one must be dependent on the other, for otherwise entering an appearance would destroy the lien and advantage of the attachment. Surely the legislature did not contemplate such a result.

The defendant insists that an appearance would not necessarily discharge the attachment, but we are wholly unable to agree to that proposition. He admits that an appearance by the defendant would change the action from one in rem to one in personam. If that be so then it must follow that the attachment which exists because the action is in rem is lost when the action becomes an ordinary personal action, unless the lien is saved by a provision such as is found in our statute respecting foreign corporations. That statute has been cited in support of defendant's argument that the lien of the attachment would remain even if there is a general appearance. But it seems

to the court that such an inference is unwarranted because the fact that the attachment is saved by the language of the act respecting
81 foreign corporations even though there is an appearance, indicates that it would not be saved, in case of appearance, by the act respecting individuals which contains no such language.

But in case of appearance without giving security, any judgment recovered by the plaintiff would be a general judgment, and for that reason also the lien of the attachment would be lost. It is hardly arguable that such a judgment, or an execution issued thereon, would be a special lien on the property seized under the attachment.

The defendant seeks to meet this objection by citing two foreign attachment cases decided by this court in which, upon motion, the judgment obtained by the plaintiff was opened and the defendant let into a trial. But it is to be noted that in those cases judgment had been recovered, and permitting the defendant thereafter to disprove plaintiffs' claim if he could, did not in any wise affect the lien of the judgment recovered in case the defendant failed in his defense. The lien on the property attached would, in that event, continue. In the two cases referred to the court evidently treated the judgment recovered as a judgment by default, and embraced within the provisions of another statute of the State which permits the court to open a judgment given by default in a summons case, and let the defendant into a trial, provided it is shown that he has a legal defense, and had no knowledge of the suit before the judgment was recovered. Revised Code, Sec. 4089.

The court, in those two cases, acted either upon the belief that a judgment recovered in a foreign attachment suit was a judgment
by default within the meaning of said act, or proceeded in
82 analogy thereto, and with the conviction that the court had the power, in the interest of fairness and justice, to afford the defendant an opportunity at some stage of the case to make a defense to the action, if he previously had no knowledge of the proceeding against him. And the court was also influenced, no doubt, by the thought, that permitting the defendant to make a defense would not prejudice or injure the plaintiff if the lien of his judgment was not affected.

Without expressing any opinion upon the correctness of the court's action in the cases referred to, or indicating what the court might do, after judgment, in a foreign attachment case where it clearly appears that it was not possible for the defendant to furnish the bail required, we say, that the action of the court permitting the defendant in a foreign attachment case to make a defense after judgment has no bearing on the question whether he can appear before judgment without entering special bail.

Another objection made to an appearance in this case is, that a trial would necessarily cause a continuance of the case and prevent the plaintiffs from recovering any judgment under the statute. The language of the statute requires that judgment shall be given at the second term if special bail is not entered. We do not decide that the court would not have the power to enter judgment after the second term, if for any reason the case had to be continued, but we do say

that under the peremptory terms of the statute it is very doubtful, and such has been the general opinion of the bar for a long period of time.

83 The defendant claims that inasmuch as the plaintiffs filed a declaration in the case and ruled pleas, he had a right to appear and plead to such declaration.

It was stated by counsel for the plaintiff that the declaration was filed out of abundant caution in view of the recent statute and new rules in relation to pleading. Whatever induced the plaintiff to file the declaration, it is certain that the fact it was filed cannot change the meaning and effect of the statute.

The defendant contends that even if his appearance and pleas should be stricken off, "the court would be without jurisdiction because it appears from the sworn statement of fact filed in the case that the Wooten Land and Fuel Company, the garnishee, while a corporation of the State of Delaware, is not now doing, and never has done, business in this State."

It is true that Section 4120 of the Revised Code provides that "All corporations doing business in this State, except banks, etc., * * * are subject to the operations of the attachment laws, as provided in the case of individuals, * * * and such corporations shall be liable to be summoned as garnishee, etc."

But the corporation was not attached in this case, neither was it summoned as garnishee. The stock of the defendant in the corporation was attached under Section 2009 of the Revised Code, which provides that, "The shares of any person in any incorporated company, with all the rights thereunto belonging may be attached for debt," etc.

Under this statute the corporation is not attached or summoned as garnishee, but an officer of the company gives to the sheriff a certificate of the number of shares held by the debtor in such
84 company. This is an old law, very general in character, and not at all inconsistent with, or limited in its operation by, Section 4120, a much later act.

Attention may be called, in this connection, to another act, Revised Code, Section 1986, which provides that: "For all purposes of title, action, attachment, garnishment * * *, the situs of the ownership of the capital stock of all corporations existing under the laws of this State * * * shall be regarded as in this State."

In view of these two statutes it is not necessary that the court should decide what is meant by the words of Section 4120, "doing business in this State"; and besides we fail to see that the statute making corporations doing business in this State liable to attachment can have any application to this case.

In respect to defendant's contention, that if there can be no appearance under the statute without entering special bail, the statute is in conflict with the fourteenth amendment of the Federal Constitution, in that it deprives the defendant of his property without due process of law, we say, that in our opinion the statute is not in conflict with said amendment. It does not deprive a defendant of the right and opportunity to make a defense to an action brought

thereunder, but merely prescribes a condition to the exercise of such right. He may appear and make his defense provided he gives security to the amount of the property attached. The security required simply takes the place of the property the defendant, by his diligence, has already seized, and there is nothing unreasonable in the requirement. It is the same thing that the defendant must

85 do in other actions in rem in order to make a defense. It is the law of the land in respect to such actions, and does not deprive the defendant of any right or property without due process of law. The requirement is not arbitrary or unreasonable, and is not different in principle nor greater than the defendant must meet in a distress for rent, other attachment, or in a *capias ad respondendum*.

The plaintiffs have failed, we think, to produce any case that is at all in conflict with our conclusion upon this point.

We are also of the opinion that the statute is not unconstitutional because, as defendant claims, it makes an improper or illegal classification of persons to be affected by it. Little stress, or reliance apparently, was placed upon this point at the argument, and we think it unnecessary to discuss it.

The decision of the court, upon the whole matter, and after carefully considering the able and interesting argument of counsel, is, that the statute in question is constitutional, and that in an action brought thereunder the defendant can appear only by entering special bail. This conclusion is supported by the great weight of authority. Indeed, we have seen no case to the contrary.

We have covered at sufficient length, we think, the points involved in this case. A discussion of all the questions raised, commensurate with the elaborate arguments made by counsel, would unduly prolong this opinion.

An order will be made in accordance with the foregoing opinion.

86 [Endorsed:] U. S. Supreme Court. James A. Ownbey, Plaintiff in Error, against John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard, as Executors of the Estate of John Pierpont Morgan, deceased, Defendant in Error.

Endorsed on cover: File No. 27,084. Delaware Supreme Court. Term No. 359. James A. Ownbey, plaintiff in error, vs. John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee, and Lewis C. Ledyard, as executors of the estate of John Pierpont Morgan, deceased. Filed April 28th, 1919. File No. 27,084.

FILED

OCT 26 1920

JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM 1920.

No. 99.

JAMES A. OWNBEY,
Plaintiff-in-Error,
against

JOHN PIERPONT MORGAN, WILLIAM P.
HAMILTON, HERBERT L. SATTERLEE
and LEWIS C. LEDYARD as Executors of
the Estate of John Pierpont Morgan, deceased.

IN ERROR TO THE SUPREME COURT OF DELAWARE.

POINTS FOR PLAINTIFF-IN-ERROR.

LOUIS MARSHALL,
Counsel for Plaintiff-in-Error.



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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 99.

JAMES A. OWNBEY,
Plaintiff-in-Error,

against

JOHN PIERPONT MORGAN, WIL-
LIAM P. HAMILTON, HERBERT
SATTERLEE and LEWIS C. LED-
YARD, as Executors of the Es-
tate of John Pierpont Morgan,
deceased.

In Error to
the Supreme
Court of the
State of
Delaware.

POINTS FOR PLAINTIFF-IN-ERROR.

The plaintiff-in-error is seeking to review a judgment of the Supreme Court of the State of Delaware which affirmed a judgment of the Superior Court of that State against him, in a proceeding for foreign attachment, for the sum of \$200,168.57 (*Rec.*, pages 35, 36, 48).

The proceedings were commenced on December 22, 1915, by the filing of an affidavit by one Thomas W. Joyce, entitled in the action, in which he describes himself to be "a credible person" and deposes

"that the defendant James A. Ownbey resides out of the State of Delaware and is justly indebted to the said plaintiffs as executors of the estate of John Pierpont Morgan, deceased, in the sum exceeding Fifty Dollars (\$50)." (*Rec.*, page 10.) A writ of foreign attachment was thereupon sued out by the attorneys for the Morgan Estate, directed to the Sheriff of New Castle County, in the following terms (*Rec.*, pages 10, 11):

"We command you, That you attach James A. Ownbey, late of your County, yeoman, by all his goods and chattels, rights and credits, lands and tenements, in whose hands or possession so-ever the same may be found within your bailiwick, so that he be and appear before the Judges of our Superior Court at Wilmington, on Monday, the third day of January next, to answer John Pierpont Morgan, William P. Hamilton, Herbert L. Satterlee and Lewis C. Ledyard as Executors of the estate of John Pierpont Morgan, deceased, of a plea of trespass on the case, etc.

And that you summon the garnishee or garnishees to appear at the Court to which this Writ is returnable, then and there to declare what goods, chattels, rights, credits, money or effects of the defendant or defendants, he, she or they hath or have in his, her or their hands, respectively: And have you then there this Writ."

The attorneys of record for the Morgan Estate thereupon caused an endorsement to be made upon the writ, fixing the bail or security necessary to be

entered by Colonel Ownbey to procure the discharge from attachment of the property to be attached thereunder in the sum of \$200,000 (*Rec., pages 10-18*). The sheriff thereupon attached 33,324-1/3 shares of the capital stock of the par value per share of \$5. of the Wootten Land and Fuel Company, a Delaware corporation, belonging to the defendant, and received from two of the directors of the corporation certificates in conformity with law (*Rec., pages 10, 11*).

The Wootten Land and Fuel Company, although incorporated under the laws of Delaware, was engaged in coal mining and other activities in Colorado and New Mexico, where it possessed valuable property. Colonel Ownbey resided in Colorado, where he had been the general manager of the corporation.

In February, 1915, the Morgan Estate brought an action in the United States District Court of Colorado against Colonel Ownbey, the Wootten Land and Fuel Company, and other persons, praying for an accounting and the appointment of a receiver for the company. A receiver was appointed. The various matters in controversy were then referred to a Master, who, at the time of the commencement of the foreign attachment case, was still engaged in taking testimony.

Because of this litigation the market value of the shares in the company owned by Ownbey, although intrinsically of the value of upwards of \$400,000, had been temporarily destroyed (*Rec., pages 18, 19, 24*). These shares constituted substantially all of the property assets and estate of Colonel Ownbey (*Rec., 18, 19, 24*).

As soon as he learned of the issuance of the writ of foreign attachment and the seizure of his shares, he proceeded to Wilmington and retained as his counsel the firm of Ward, Gray & Neary. He informed them that he had a full and complete defense to the demands made against him and instructed them to enter an appearance for him and to prepare his case to meet the issues upon their merits at a full and fair trial before the Court. They then advised him that it had been the general practice in Delaware to enter bail for the amount marked by the attorney for the plaintiff on the praecipe in a suit of foreign attachment before entering upon a defense, and on examining the record they learned that the bail demanded was \$200,000 (*Rec.*, page 24). Colonel Ownbey thereupon made every possible effort to secure bail in the sum demanded in Washington, New York, Chicago, and Denver and Boulder, Colorado. He attempted to secure bail from the American Surety Company, the National Surety Company, the Maryland Casualty Company, the Illinois Trust and Savings Bank of Chicago, the Boulder National Bank, Senator Robert L. Owen, and other individuals and financial institutions. He offered to assign all of his stock in the Wootten Land and Fuel Company that had been attached, together with everything else that he had in the world, as collateral security to indemnify the surety. He found it, however, an absolute impossibility to secure the bail required because of the fact that a receiver was in possession of the Wootten Land and Fuel Company in whose stock his entire fortune was invested (*Rec.*, page 25).

In the meantime and on January 17, 1916, the Morgan Estate filed with the Prothonotary of the

Superior Court a narr. and a plea of trespass on the case upon promises, containing the common law counts, to the effect that the defendant had on March 3, 1913, and during the lifetime of John Pierpont Morgan, become indebted to him in the sum of \$200,000 (*Rec., pages 13-15*). Thereupon, in conformity with the usual practice, Messrs. Ward, Gray & Neary entered their appearance for the defendant in the foreign attachment case by writing their names opposite that of the defendant on the Appearance Docket of the Court for 1916 (*Rec., pages 16-18*). The defendant pleaded with copy "Non Assumpsit." "Statute of Limitations." "Payment." These pleas were received and marked "Filed" by the Prothonotary and were entered in the Appearance Docket with the notation "Rule rejs and issues by the second general rule day in March" (*Rec., pages 15-17*).

The attorneys for the Morgan Estate thereupon moved that the appearance of Ward, Gray & Neary for the defendant and the entry made in the appearance docket by the Prothonotary be stricken out and that the paper containing the defendant's pleas be stricken from the files of the Court (*Rec., pages 16-17*). The defendant replied to this motion, setting forth, under oath, the facts above detailed and alleging that he had a good defense "to the whole or any cause of action stated in said suit, the nature of which defense is that there exists no indebtedness upon any account or for any sum or sums of money whatsoever, due to said plaintiffs or their decedent, the said John Pierpont Morgan, from said defendant either at this time or at the time said suit was instituted" (*Rec., page 19*). It was further contended that the

procedure adopted on behalf of the defendant was regular under the statutes of Delaware, and then followed these allegations (*Rec., page 20*) :

"If the statutes of the State of Delaware, relating to foreign attachments, cannot be duly construed so as to permit appearance and defense, in the case of a cause begun by foreign attachment, without the entry of bail or security for the discharge of the property seized under such writ, such statutes are unconstitutional under the first section of the Fourteenth Amendment of the Constitution of the United States, in that :

a. Such statutes are laws abridging the privilege and immunities of citizens of the United States.

b. Such statutes deprive parties defendant in cases brought thereunder of property without due process of law.

c. Such statutes deny such defendant the equal protection of the laws.

To require the defendant in this case to give bond in the sum of \$200,000, or in any sum adequate to secure the payment of the amount of moneys claimed by plaintiff therein or to procure the dissolution of said attachment and the release therefrom of the shares of stock so attached, as a condition precedent to the allowance of an appearance and entry of pleas in bar in said cause by said defendant, is oppressive, unreasonable and in violation of fundamental principles for the administration of justice."

A motion was then made to strike out the appearance of Ward, Gray & Neary and their

reply in opposition to the plaintiff's motion, because of the failure of the defendant to enter special bail (*Rec., page 21*). Whereupon, after reciting the state of the record, it was adjudged:

"It further appearing that special bail or security required by the statutes of the State of Delaware in suits instituted by writs of attachment, has not been given or entered in said attachment by the said defendant, or any person for him;

It is ordered by the Court, that said attempted appearance of Ward, Gray & Neary, Esqs., for said defendant and the said docket entries made by the Prothonotary as aforesaid, be stricken out, and that said paper writings containing pretended pleas and reply to plaintiff's motion, marked 'Filed' by the Prothonotary as aforesaid, be stricken from the files of this Court; and

It is further ordered, That judgment for want of an appearance, collectible only from property attached, be entered in favor of the said plaintiffs and against the said defendant, and further that the amount of said judgment be ascertained by inquisition at bar." (*Rec., pages 22-23.*)

A motion was then made on behalf of the defendant to open the judgment on a further statement of facts descriptive of the unfortunate plight in which he found himself in consequence of the requirement that, as a condition to appearing and defending the action, he should enter bail in the sum of \$200,000 (*Rec., pages 24-26*). The attorneys

for the Morgan Estate moved that this motion be stricken from the files of the Court. Both motions were then directed to be decided by the Court in Banc, where, after argument, it was directed that the rule to show cause why the judgment entered be not opened should be discharged (*Rec., pages 30-33*).

Then followed an inquisition by a jury which fixed the amount of the recovery of the Morgan Estate, and judgment was entered accordingly, which was followed by an order that the shares of stock that had been attached by virtue of the writ issued in this cause, or so many of said shares as shall be sufficient to satisfy the debt, interest and costs, be sold at public sale to the highest bidder upon such notice as is required for sales upon execution process (*Rec., pages 35-40*).

The opinion of the Court in Banc is reported in 100 Atl. Rep. 411-434, 6 Boyce, 379. In the course of it Chief Justice Pennewill said:

"The court have been very strongly impressed, during the progress of this case, with the thought that the situation of the defendant was not only a hard one, but also very exceptional. Having no property whatever except the corporate stock attached, the attachment together with the receivership secured in Colorado made it impossible for the defendant to enter the bail demanded in the action. By the receivership proceeding the stock was stripped of any immediate market value and became practically worthless as a security or pledge for advancement or loan.
* * * Because of the peculiar circumstances

of the case, and the inability of the defendant to appear by giving the bail required, his motion to open the judgment in order that he might have an opportunity to make a defense, and the case be tried on the merits appealed strongly to the sympathy and discretion of the court. But after a most careful consideration of all the facts we are forced to the conclusion that no sufficient reason has been shown to justify the opening of said judgment.

We are clearly of the opinion that the Legislature ought to provide for the opening of a judgment in foreign attachment against an individual in the same manner as is provided in cases against corporations, but we are equally clear that the court cannot relieve the defendant from the hardship imposed by the statute. To do so would be judicial legislation.

While the position of the defendant is difficult and unfortunate, the case is, after all, not exceptional save in the amount of bail demanded. Another case involving similar facts will probably never arise in the Superior Court again, but it will frequently happen that a defendant will find it impossible to furnish the security required; and such impossibility may be caused by the fact that he has no property other than that attached. It may be just as difficult or impossible for an individual of small means to furnish the bail required to dissolve the attachment as for a man of large property which is so situated as to be unavailing as security for a loan."

The defendant then sued out a writ of error to the Supreme Court of Delaware, upon Assign-

ments of Error set forth at *Rec.*, pages 40-43. Thereupon the attorneys for the Morgan Estate moved to strike out practically all of the record that had been returned to the Supreme Court, in order to prevent a review of the judgment rendered by the Superior Court. This motion was denied Chancellor Curtis saying (105 *Atl. Rep.*, 845):

"Here the defendant claimed the right to appear and defend the action without the entry of special bail. For this purpose he entered a general appearance and filed pleas. These were stricken out by the court because special bail had not been given. Other steps were taken by the defendant to enable him to defend the action on its merits, but it is not necessary to refer to them in detail in considering this point, because the striking off of the general appearance and pleas of the defendant deprived him of opportunity to defend the action on the merits and allowed the plaintiff to obtain a final judgment, through the successive proceedings of a judgment by default and inquisition without a contest on the merits. Therefore, the order striking off the appearance and pleas determined the case so far as the defendant was concerned, though the plaintiff necessarily went on to obtain final decision of his rights. Such an order is reviewable in this, the appellate tribunal, which has been given jurisdiction to determine all errors in the judgments and proceedings of the court below. * * *

Inasmuch as the right to appear and defend without entry of special bail is the issue, and

the refusal of the right is determinate of the cause so far as the defendant was concerned, the striking off of the appearance and the plea setting up the defense cannot prevent this court from reviewing that determinative action. Any other view would be to make a mockery of judicial proceedings, and outrage justice and right. By no stretch of the imagination can such a judicial order be considered discretionary, or within any of the classes of judicial decisions and actions which are not reviewable."

The case then proceeded to argument and resulted in an affirmance (105 *Atl. Rep.*, 849), the Court, after referring to the briefs filed and arguments presented, saying:

"However, as the judges comprising the Supreme Court at the time of the argument were also members of the court in banc at the time that court heard and determined the same questions raised by the assignments of error, and also in view of the fact that the same questions cannot arise in the future for the reason that by recent legislation defendants in foreign attachment cases are permitted to appear without first giving bail, we will not state reasons for our decision in this court, our conclusions being the same as they were at the time the case was argued and determined by the court in banc."

The Statutes of Delaware Affecting This Case.

These statutes are contained in Chapter 126, entitled "Attachments," of the Revised Code, the material provisions of which are as follows:

4142. Sec. 25. *Foreign Attachment; When May Issue; When on Affidavit, Purport of; Procedure When Some of the Defendants are Residents and Some Not:*

"A writ of foreign attachment may be issued against any person not an inhabitant of this State, after a return to a summons, or capias, issued and delivered to the Sheriff or Coroner, ten days before the return thereof, showing that the defendant cannot be found, and proof, satisfactory to the Court, of the cause of action; or upon affidavit made by the plaintiff, or some other credible person, and filed with the Prothonotary, that the defendant resides out of the State, and is justly indebted to the said plaintiff in a sum exceeding fifty dollars. And where there are two or more defendants, one a resident of the State but without available means to pay the plaintiffs' claim, the fact may be so stated in such affidavit, and the attachment thereon may issue against the non-resident defendant or defendants with the same effect as if such non-resident defendant or defendants was or were the only defendant or defendants in the cause."

4143. Sec. 26. *Foreign Corporation; Subject to Foreign Attachment Laws; How Writ Obtained:*

Affidavit; Purport of; Writ; How Framed, Directed; Executed and Returned; Attachments Dissolved; Judgment, When Obtained; Security for Dissolution of Attachment; Form and Amount of How Determined:

"A writ of foreign attachment may be issued out of the Superior Court of this State against any corporation, aggregate or sole, not created by or existing under the laws of this State, upon affidavit made by the plaintiff or any other credible person, and filed with the Prothonotary of said Court, that the defendant is a corporation not created by, or existing under the laws of this State, and is justly indebted to the said plaintiff in a sum of money, to be specified in said affidavit, and which shall exceed fifty dollars.

The said writ shall be framed, directed, executed and returned, and like proceedings had as in the case of a foreign attachment issued under the next foregoing section, except that attachments to be issued under this section shall be dissolved only in the manner hereinafter provided.

In any attachments to be issued under this section, judgment shall be given for the plaintiff at the second term after the issuing of the writ, *unless the defendant shall have caused an appearance by attorney to be entered, in which case the like proceedings shall be had, as in suits commenced against a corporation by summons; Provided, however, if the defendant in the attachment or any sufficient person for him, shall, at any time before judgment, give security for the payment of any judgment that may be*

recovered in said proceedings with costs, then the garnishees and all the property attached, shall be discharged, and the attachment dissolved, and like proceedings be had as in other cases of foreign attachment, in which the attachment has been dissolved by special bail. Such security shall be approved, and the form and amount thereof determined by the court in term time, or by any judge thereof, in vacation; but the court may prescribe the form of such security by general rule in that behalf."

4145. Sec. 28. *Writ of Foreign Attachment; Proceedings Upon; Plaintiff Has Benefit of His Discovery; Judgment How Proceeded on; Refunding Recognizances:*

"The said writ shall be framed, directed, executed and returned, and like proceedings had, as in the case of a domestic attachment, except as to the appointment of auditors and distribution among creditors; for every plaintiff in a foreign attachment shall have the benefit of his own discovery, and, after judgment, may proceed, by order of sale *feri facias*, *capias ad satisfaciendum* or otherwise, as on other judgments.

Provided, that before receiving any sum under such judgment, the plaintiff shall enter into recognizance as required by Section 18 preceding."

4122. Sec. 5. *Writ of Attachment; How Directed; Purport of:*

"The writ of attachment shall be directed as other writs are, and shall command the

officer to attach the defendant by all his goods and chattels, rights and credits, lands and tenements, in whose hands, or possession, soever, the same may be found in his bailiwick, so that he be and appear at the next Superior Court, to answer the plaintiff's demand; and that he summon the defendant's garnishees to appear at the said Court to declare what goods, chattels, rights, credits, money, or effects of the defendant, they have in their hands respectively."

4150. Sec. 33. *Attachment of Corporate Stock.*

"The shares of any person in an incorporated company, with all the rights thereto belonging, shall be subject to attachment as provided by Sections 95 to 99 inclusive, of Chapter sixty-five."

4123. Sec. 6. *Dissolution of Attachment; Security; Form of; How Executed; Obligation of Record; Effect of; How Enforced:*

"If the defendant in the attachment, or any sufficient person for him, will, at any time before judgment, appear and give security to the satisfaction of the plaintiff in such cause, or to the satisfaction of the court and to all actions brought against such defendant, to the value of the property, rights, credits and monies attached, and the costs, then the garnishees and all property attached shall be discharged. The security may be taken thus: 'On the.....day of.....19..... A. B. becomes security in the sum of.....

that C. D. shall answer the demand of E. F. in this suit, *and shall satisfy any judgment to the extent of the value of the property attached, that may be recovered against him therein;* which entry, on the appearance docket, shall be signed by the security, and shall be an obligation of record of the same force and effect, and subject to the same remedy by an action of debt, as any other obligation for the payment of money may be."

4135. Sec. 18. *Refunding Recognizance; Right of Debtor to Appear and Disprove Debt; Time Within Which Right Must be Exercised; Proceedings For:*

"Provided, that before any creditor shall receive any dividend or share, so distributed, he shall, with sufficient surety, enter, into recognizance to the debtor, before the Prothonotary, in a sufficient sum, to secure the repayment of the same, or any part thereof, if the said debtor shall, within one year thereafter appear in the said court and disprove or avoid such debt, or such part thereof.

The proceeding for this purpose may be by motion to the court, and an issue framed and tried before the same."

4137. Sec. 20. *Judgment Upon Attachment; When; Order for Sale:*

"Judgment shall be given for the plaintiff in the attachment the second term after issuing the writ, unless the defendant shall enter

special bail as aforesaid, whereupon, the Court shall make an order that the sheriff shall sell the property attached, on due notice, and pay the proceeds (deducting legal costs and charges) to the Auditors for distribution."

4146. Sec. 29. *Sales; Force and Effect of; Officer May Plead Chapter in Justification:*

"All sales under this Chapter shall be good against the defendant, his executors, administrators and assigns; and if action be brought against any officer, or other person, acting under the authority of this Chapter, he may, under the general issue, give this Chapter in evidence in his justification."

BAIL.

4099. Sec. 1. *How Taken; Condition of Bond:*

"Bail shall be taken by the joint and several bond of the defendant and his bail to the sheriff, or officer to whom the writ is directed, and his assigns, *in the sum endorsed on such writ*, with condition, in substance, that if the defendant shall appear before the court mentioned in such writ, at the place and time of the return thereof, to answer as therein required, the said bond shall be void."

4100. Sec. 2. *Amount of Bail Endorsed on Writ; Who may Fix and discharge on Common Bail; Notice of Hearing for; Appearance; Upon Discharge on Common Bail; Upon Special Bail:*

"The sum in which bail is demanded shall be endorsed on the writ. The Superior Court, or any Judge thereof, may, on complaint, fix the amount of bail, or discharge the defendant on common bail.

The plaintiff, or his agent, or attorney, if residing in the County, shall have notice of the time and place of hearing such complaint, and the plaintiff's affidavit shall be received to show cause of bail. When a defendant is discharged on common bail, his appearance shall be entered on the return of the process. When a bail bond is given, the defendant cannot appear without giving special bail to the action, unless by order of court, or with the plaintiff's consent."

4101. Sec. 3. *Bail bond; Assignment of; By Whom; To Whom; How; When for a Use:*

"The sheriff, or officer to whom a bail bond is given, or his executors or administrators, shall, upon request, assign it to the plaintiff, or his executors, or administrators, by endorsement under seal, attested by one or more witnesses.

By special order of court the assignment may be to a person for whose use the action is brought, or his executors, or administrators."

Assignments of Error.

They are set forth at Record, pages 2-5 with some elaboration and may be summarized as follows:

FIRST. The Supreme Court of Delaware, erred in affirming the judgment of the Superior Court whereby the appearance of Ward, Gray & Neary, the docket entries and pleas and reply to the motion were stricken from the files of the court and judgment for want of appearance was entered, in that the statutes in conformity with which such judgment was rendered deprived the plaintiff-in-error of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and denied him the equal protection of the laws.

SECOND. The Supreme Court of Delaware erred in preventing the plaintiff-in-error from making his defense against the claims of the defendant-in-error and rendering judgment for want of his appearance, in that the plaintiff-in-error was thereby deprived of his property without due process of law and denied the equal protection of the laws.

THIRD. The Supreme Court of Delaware, erred in ordering judgment to be entered in default against the plaintiff-in-error, in violation of the due process and the equal protection clauses of the Constitution.

FOURTH. The Supreme Court of Delaware, erred in affirming the judgment of the Superior Court which required the plaintiff-in-error to give bail in the sum of \$200,000 before the plaintiff-in-error could have an opportunity to enter appearance or make defense to the claim of the defendants-in-error and rendered judgment in favor of the latter in default of the ability of the plain-

tiff-in-error to furnish such bail, all of which was in violation of the due process and equal protection clauses of the Constitution.

FIFTH. The Supreme Court of Delaware, erred in affirming the judgment of the Superior Court whereby the motion of the plaintiff-in-error to be permitted to appear and defend against the claim of the defendants-in-error was denied, in consequence of which the plaintiff-in-error was deprived of his property without due process of law and was denied the equal protection of the laws.

SIXTH. The Supreme Court of Delaware erred in affirming the judgment of the Superior Court directing that the shares of the capital stock belonging to plaintiff-in-error in the Wootten Land and Fuel Company, that had been attached should be sold, whereby the plaintiff-in-error was deprived of this property without due process of law and was denied the equal protection of the laws.

SEVENTH. The Supreme Court of Delaware, erred in deciding that the statutes of Delaware and the proceedings thereunder in this cause, whereby judgment was rendered against the plaintiff-in-error without according to him a hearing or an opportunity to be heard, were nevertheless constitutional and that the plaintiff-in-error was not thereby deprived of his property without due process of law in that such decision was in violation of the Fourteenth Amendment to the Constitution of the United States.

EIGHTH. The Supreme Court of Delaware, erred in not reversing the several judgments and orders

of the Superior Court of Delaware, and granting the plaintiff-in-error the right to appear and be heard, or according to him an opportunity to appear and be heard, in this cause, and to contest therein the right of the defendants-in-error to the judgment rendered in their favor against him, such decision constituting a deprivation of due process of law and a denial of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

Argument.

I

The Statutes of Delaware and the proceedings taken thereunder in this case are unconstitutional and void, in that Ownbey, the plaintiff-in-error, was thereby deprived of his property without due process of law.

(a) The essential elements of due process, namely, the right to appear and to be heard in defense of the action in which Ownbey's property was attached are lacking here.

Although this Court has, very wisely, refrained from attempting a comprehensive definition of "due process," it has, nevertheless, determined, by a long line of decisions, that in so far as it relates to legal procedure which may effect life, liberty or property due process depends on the concurrence of two component elements, (1) the giving of notice to the person affected, of the proceedings

by which he is sought to be charged or condemned, and (2) the according to the person proceeded against of the right to a hearing or an opportunity to be heard in his defense.

This right or opportunity to be heard, is not one which is limited to any particular phase of the proceeding. It must of necessity involve the initial right to appear in court in defense of an action instituted, especially one which is accompanied by the seizure of property. This right to appear must be unqualified and unconditional. It is not a right, if dependent upon the performance of onerous requirements, or if its enjoyment depends on the discretion of the court in which the action is brought, or on the consent of the plaintiff. It is not an opportunity to be heard, if its exercise is conditioned upon the giving of a bond, or the deposit of money, or any other similar exaction. It is as if never granted, if it may be taken away or withheld at any stage of legal proceedings which may result in an adverse judgment. It is a right, co-extensive with the entire proceeding, from its beginning to its termination. Thus a party would be deprived of due process were he merely permitted to appear, on giving security for the payment of a judgment which may or may not be ultimately recovered by the plaintiff, or even if he be allowed to interpose an answer, and is thereafter prohibited from participating in the trial of issues on which his life, liberty or property depend, or from examining and cross examining witnesses, or from being present and heard at the various stages of the proceeding.

The right or opportunity to appear on the conditions instanced would not constitute even the shad-

ow of a right, just as the right to be heard would be an idle thing, if accorded in the early or preliminary stages of a trial and denied at its culmination. The mere interposition of an answer or a plea, without the right of participation in the trial, would be the substitution of form for substance, and a disregard of the underlying purpose of legal process. Clearly, the withholding or denial of the right to appear, except on conditions, compliance with which must precede appearance, amounts to an absolute denial of the right to appear and defend. The object of legal process, is not merely to bring a party into court, but to enable him when brought there, to appear and be heard for the protection of his rights, and to meet any emergency that may arise, until judgment has been finally pronounced.

Of what avail is the service of a summons or of a citation, or of any other process, to one haled into court to answer a demand for judgment made against him, if he is to be gagged and bound hand and foot, and prohibited from entering the court into which he is cited? Such a prohibition annuls the process, makes of it a mere "scrap of paper," and deprives it of all efficacy. The purpose of issuing process is to enable the defendant to have his day in court, to show cause why judgment should not be rendered against him. If, therefore, the defendant is not permitted to enter the court, or, if permitted to penetrate within its precincts, he is debarred from speaking, it is as though no process had ever issued. He has neither been heard nor has he had an opportunity to be heard.

The writ issued in this cause (*Rec.*, pages 10, 11) commanded the sheriff to attach the defend-

ant "so that he be and appear before the Judges" of the Superior Court "to answer" the Executors of the Morgan Estate "of a plea of trespass on the case, etc." When he attempted to conform with the command of the writ by appearing and answering he was literally turned out of court and was by its action prevented from appearing and answering, and cast in judgment.

It is no answer to say that he might have been permitted to appear and to be heard had he complied with the requirement of his adversary to execute a bond with surety in such amount as such adversary had designated. That in effect, makes conditional what, within the meaning of the Constitution, must be unconditional. That would enable a plaintiff to prevent a defendant from enjoying his constitutional right to be heard, by affixing conditions impossible of performance. As was conceded by Chief Justice Pennewill, speaking for the court in banc, it would enable a rich man to have his will, without let or hindrance, against a poor defendant unable to furnish the security demanded. That, as was likewise conceded would make it possible to seize all of the property of a non-resident by attachment, and at the same time prevent him from contesting the justice of the demand sought to be enforced by means of the attachment.

People ex rel. Eckerson vs. Board of Trustees of Hacerstraw, 151 N. Y., 75, indicates the underlying vice of the contention of the defendants-in-error. It is true that that case involved a provision of the Constitution providing that no private property shall be taken for public use without just compensation. From the standpoint of constitu-

tional law, however, the same considerations apply in the present case as those which there prevailed. The Constitution of New York, which was there involved, provides that when land is taken by eminent domain compensation must be fixed either by a jury or by commissioners of appraisal. A highway act had been enacted which provided that the compensation to be awarded to a property owner for land taken for highway purposes, was to be tried before a body of men called a "jury." That act was, however, declared to be unconstitutional, because the "jury" for which provision was made was not such a jury as was contemplated by the Constitution. The act further provided that after a trial by the "jury" specified the property owner might appeal to a County Judge to obtain a new assessment of damages by commissioners to be appointed by that officer, provided the property owner gave a bond in the penalty of \$250, with sureties, conditioned for the payment of the fees of the commissioners and the costs of the appeal if the award of the jury to the party appealing was not increased to the extent of \$20. The latter provision was declared unconstitutional, the court holding that when the primary method provided by the legislature for awarding compensation is unconstitutional the requirement of the organic law was not satisfied by the giving of a right of appeal whereby the compensation might be ascertained in a manner prescribed by the Constitution, but only on condition that the property owner, before he could exercise his constitutional right, gave bail for the payment in a specified contingency of the costs of the proceeding. In the course of his opinion Judge Vann said:

"The appeal, therefore, must not be granted *ex gratia*, but as a matter of strict constitutional right, and hence so unshackled as to be freely enjoyed without regard to ability to give bail or pay costs. When the first trial provided by the statute is valid, the legislature can so restrict the privilege of appealing as it sees fit or can withhold it altogether. It is only when the appeal affords the only trial which accords with the Constitution that it must be given *without any condition that the land owner may not be able to comply with*. The authorities, therefore, which sustain the right to require bail or award costs on an appeal, after a trial by a constitutional method, do not apply to this case; for, as we have held, the first trial provided by the statute is not in accordance with the Constitution. An appeal that can be taken only upon the condition of giving a bond in the penalty of \$250 with two sureties justifying in twice that amount and conditioned for the payment of the fees of the commissioners and the costs of appeal, provided the award of the jury is not 'increased twenty dollars' to each party appealing, is not a reasonable regulation of procedure, as it may result in depriving the land owner of the right to appeal, and hence of the right to any trial in accordance with the Constitution."

In *Matter of City of Rochester vs. Holden*, 224 N. Y., 386, 396, which also was in the nature of a condemnation proceeding, the statute provided for the appointment of commissioners to award com-

pensation. A report was to be submitted to the common council of the municipality instituting the proceedings for confirmation, disapproval or rejection. After confirmation any person aggrieved by the award was permitted to appeal to the Appellate Division of the Supreme Court on the filing with the notice of appeal of a bond with sureties in the penalty of \$1,000, conditioned for the diligent prosecution of the appeal and for the payment of all costs and charges that might be awarded against him. Referring to this procedure Judge Collin said :

“The legislature had the power to provide, as a matter of convenience or expediency or otherwise, that the commissioners should make their report to the common council, instead of to the court which had acquired jurisdiction through the application for and the appointment of commissioners, and that the common council should after investigation confirm, disapprove or reject it. A landowner was, however, constitutionally entitled to be finally heard, if he desired, by a competent and disinterested tribunal * * *. The legislature was bound to provide that any landowner or party aggrieved by the action of the interested common council should have the right to reach, through an appeal or otherwise, without burdensome or impeding conditions, an impartial and disinterested tribunal empowered to review and correct the action of the common council. ‘In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property con-

stitute one of the most certain tests of the character and value of the Government.' *Monongahela Navigation Co. vs. United States*, 148 U. S., 312. The legislative provisions before us give to the landowners the right to appeal in the case only of the confirmation of the report. In the case of the rejection or disapproval of it the decision of the common council is, in effect, as to a landowner, final and conclusive. In the case of the confirmation the right of appeal is conditioned by the giving of the bond, as we have stated. The right of appeal so given is not to be regarded as a matter of favor or privilege, but as a matter of right, because the common council, by whose determination the compensation was fixed, was interested. It should be, therefore, and is not, unqualified and attainable without regard to ability to give a bond. *People ex rel. Eckerson vs. Trustees of Haverstraw*, 151 N. Y., 75."

Here the defendants in error, claiming in the initial affidavit of Joyce, who describes himself as "a credible person" that Ownbey was indebted to them "in a sum exceeding \$50," by endorsing upon this affidavit the words "Bail \$200,000," have thus far succeeded in defeating his every effort to come into court to disprove the allegations made against him, and to relieve his property from seizure by establishing the non-existence of a cause of action solely because he has been unable to give bail in the sum of \$200,000, due to the fact that all of the property that he has in the world has been seized in this very action, at the instance of the defendants

in error. His elementary right of appearing and defending and protecting his property, is thus made dependent upon his ability to give bail in a sum fixed, not by a court, but by his opponent in the litigation. In other words, the defendants in error made themselves *domini litis*, not only so far as the presentation of their contentions to the court was concerned, but they have thus far been enabled successfully to prescribe the conditions with which he whom they have cited into court must comply before he may have his day in court.

This is a monstrous incongruity. It is as far removed from due process as the poles are asunder. It is not a free unfettered, untrammelled right to present a defense to the court. It is a contrivance which not only silences the defendant who is brought into court, but ejects him from its precincts and slams upon him the portals of the temple of justice. Not only is the defendant silenced, but it is declared that a court of justice which has invited him to present before it such defenses as he may have to the demand prosecuted against him, shall not hear him, shall pay no attention to his plea for justice, shall render judgment against him as upon a default, in spite of his frantic efforts to prevent the rendition of such judgment by showing that, in truth and in fact, no cause of action exists against him. And all this because the suitor who has come into court praying for judgment has by his arbitrary act, which is claimed to have the sanction of the laws of Delaware, required as a condition of permitting him against whom judgment is sought to appear and defend that he gave a bail bond for, to him, an impossible amount.

If the New York statutes to which attention has been called were unconstitutional because the property owners were required to give bonds for only \$250 and \$1,000, respectively, as a condition of being heard in proceedings for the taking of their property by eminent domain, what shall be said of a statute under which one whose property has been seized by attachment is required to give a bond for \$200,000, as a condition of his being permitted to defend the action instituted against him, wherein such seizure is made?

We contend that the solemn adjudications of this Court condemn the procedure pursued in the courts below, and the validity of the statute as construed by them, on which the judgment under review, was predicated. It is only because of the importance of this case and the apparent disregard by the Courts of Delaware of these well known decisions that we venture to collate them and to quote from them at what may seem to be, unnecessary length.

The most important of these cases in which the principle which we invoke was elaborately and lucidly considered is *Hovey vs. Elliott*, 167 U. S., 409—a great constitutional landmark. There, the court of original jurisdiction *after the service of process and the joinder of issue* struck defendant's answer from its files, as a punishment for his contempt in refusing to obey one of its orders. In consequence, a decree *pro confesso* was entered against him. Its validity was challenged, and its nullity was proclaimed, because it was wanting in due process of law, from the instant that the defendant was debarred from being further heard in his defense. Chief Justice, then Mr. Justice White, said:

"In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing pñenary power to punish for a contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

"In *McVeigh vs. United States*, 11 Wall., 259, the court, through Mr. Justice Swayne,

said (page 267): 'In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice. *Calder vs. Bull*, 3 Dallas, 388; *Bonaker vs. Evans*, 16 Adolphus & Ellis, 170; *Capel vs. Child*, 2 Crompton & Jervis, 574.'

"And quoting with approval this language, in *Windsor vs. McVeigh*, 93 U. S., 274, the court, speaking through Mr. Justice Field, again said (pages 277, 278): 'The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other

tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

"This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard. Thus (Coke 2 Inst., 346), in commencing on the 29th chapter of Magna Charta, says: 'No man shall be disseized, etc., unless it be by the lawful judgment; that is, verdict of his

equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all), by the due course and process of law.' * * *

"Story, in his treatise on the Constitution (vol. 2, §1789), speaking of the clause in the Fifth Amendment, where it is declared that no person 'shall be deprived of life, liberty, or property without due process of law,' says: 'The other part of the clause is but an enlargement of the language of Magna Charta, *'nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium peerum suorum, vel per legem terre'* (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *per legem terre* (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brought into answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.'

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to

render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

"In *Galpin vs. Page*, 18 Wall., 350, the court said (page 368). 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'

"Again, in *Ex Parte* Wall. 107 U. S., 263, 289, the court quoted with approval the observations as to 'due process of law,' made by Judge Cooley, in his *Constitutional Limitations*, at page 353, where he says:

" 'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every

citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

"And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry,' and 'render judgment only after trial.'"

"The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words, his property, belonged to the complainants in the case. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law. If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to pro-

ceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law. No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards."

In *McVeigh vs. United States* (11 Wall., 239), a libel or information, under the Act of July 17, 1862, was filed in the District Court for the District of Virginia, for the forfeiture of certain real and personal property of the plaintiff-in-error. He appeared by counsel and made a claim to the property and filed an answer. The attorney of the United States moved that the claim, answer and appearance be stricken from the files, as it appeared from the answer filed that, at the time of filing it, the party was a resident of the City of Richmond, within the Confederate lines, and a rebel. The court granted the motion. Default was then taken and a judgment rendered for the condemnation and sale of the property. The case was taken to the Circuit Court, where the judgment was affirmed, and was then brought to the Supreme Court on a writ of error. The report of the case states, at page 261: "This answer was not contained in the record, and nothing of its contents appeared except what was stated in the order of

the court made on the motion of the attorney of the United States." On the argument in the Supreme Court the point was raised, that McVeigh was incompetent to sue out the writ of error. It was, however, held that he had such right, Mr. Justice Swayne saying:

"It is objected that McVeigh was incompetent to sue out this writ of error. His alleged criminality lies at the foundation of the proceeding. It was averred in the libel that he was the owner of the property described, and that he was guilty of the offenses charged, which rendered it liable to forfeiture. The questions of his guilt and ownership were therefore fundamental in the case. The notice by publication was given to bring him constructively before the court. It was in the nature of the substituted service of process. If he failed to appear, his absence and silence could not affect the validity of the proceedings. After the decree *pro confesso*, he occupied the same relation to the record as a defendant against whom a judgment by default has been taken. * * * We entertain no doubt that the plaintiff-in-error had the right to sue out the writ, and that the record is properly before us for examination."

The Court then used the language quoted in the opinion of Mr. Justice White in *Hovey vs. Elliott* (*supra*) and proceeds to say:

"Whether the legal status of the plaintiff-in-error was, or was not, that of an alien enemy, is a point not necessary to be considered;

because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense. In Bacon's Abridgement (Title Alien, D) it is said: 'For as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery.'"

In *Windsor vs. McVeigh*, 93 U. S., 274, Mr. Justice Field in addition to what was quoted from his opinion in *Hovey vs. Elliott* (supra) said:

"The doctrine invoked by counsel, that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause,

of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * *

"So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is that the courts are not authorized to exert their power in that way.

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. * * *

"It was not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing. *And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore,*

could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction."

Scott vs. McNeal, 154 U. S., 34, involved the validity of a decree of a court of probate appointing an administrator of the estate of a living person, made after public notice. Mr. Justice Gray there laid down the rule of decision applicable:

"Their prohibitions [those of due process and the equal protection of the laws] extend to all acts of the State, whether through its legislative, its executive or its judicial authorities. *Virginia vs. Rives*, 100 U. S., 313, 318, 319; *Ex parte Virginia*, 100 U. S., 339, 346; *Neal vs. Delaware*, 103 U. S., 370, 397. And the first one, as said by Chief Justice Waite in *United States vs. Cruikshank*, 92 U. S., 542 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia vs. Okely*, 4 Wheat., 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of a territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law than when the

question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute. *Huntington vs. Attrill*, 146 U. S., 657, 683, 684; *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S., 486, 492-495. * * *

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. to give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.' *Pennoyer vs. Neff*, 95 U. S., 714, 733."

Roller vs. Holly (176 U. S., 398), likewise furnishes an interesting application of the due process clause. Attention is especially called to what Mr. Justice Brown said on pages 408, 409, with respect to a statute under which a defendant residing in Virginia was required to appear and answer a suit in Texas within five days:

"From these requirements it appears that the time for service of process in the courts of Texas was five days, exclusive of the day of service and return, and that there is no distinction in this particular between defendant's living in the town where the court is sitting and defendants living in other States, or even in a foreign country. In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. In the case under consideration it is admitted that the defendant was served with notice on December 30, 1890, at Harrisonburg, Rockingham County, Virginia, to appear on January 5, 1891, at Groesbeck, Limestone County, Texas; that it would have required four days of constant traveling to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit. It is true that, by articles 1280 and 1281, the case could not have been called for trial or default until the fifth day of the term, January 9, and that Roller's default was not actually taken and judgment entered until that day. But, as a citizen of Virginia, he was not bound to know the practice of the Texas courts in that particular, and was at liberty, even if he were not compelled, to construe the notice as it read upon its face. Very probably, too, the court which rendered the judgment would have set the

same aside, and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law rests upon a basis more substantial than favor or discretion.

That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson vs. New Orleans*, 96 U. S., 97; *Hagar vs. Reclamation District*, 111 U. S., 701-712. What shall be deemed a reasonable notice admits of considerable doubt. In the case of a witness subpoena the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to the court with the utmost dispatch, or at least present himself upon the return day of the writ. An ordinary summons, however, to answer the suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defense."

That was an action for the foreclosure of a vendor's lien and was regarded as a suit in rem. The significance of the case is, that the only object of

serving process was to enable the defendant to come in and defend. If the statute in that case, instead of providing that the defendant would have to appear and defend in five days, had required him as a condition of appearing and defending to have paid into court the amount of the lien sought to be foreclosed, the situation would have been in no wise different from that upon which the adjudication rested. In the one case the notice was unreasonable and inadequate for the purpose of giving the defendant a reasonable opportunity to defend; in the other case he would be prevented from appearing and defending by an unreasonable condition. In both cases the process bade the defendant to come and defend and in each of them he was prevented from defending by physical difficulties interposed by the statute.

In *Central of Georgia Railway vs. Wright*, 207 U. S., 127 it was laid down that due process of law requires that opportunity to be heard as to the validity of a tax of the amount of the assessment be given to a taxpayer, who without fraudulent intent and in the honest belief that he is not taxable, withholds property from tax returns, and this requirement is not satisfied where the taxpayer is allowed to attack the assessment only for fraud and corruption. The assessment of a tax was declared to be action judicial in its nature requiring for the exertion of the power such opportunity to appear as the circumstances of the case require, and this Court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining whether the taxpayer has been afforded due process of law. Mr. Justice Day said:

"In view of this statute as thus construed the question made is, whether due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds, withholds property from tax returns with an honest belief that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward upon a suit to collect taxes, or by independent suit to enjoin their collection. * * *

"Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. *Davidson vs. New Orleans*, 96 U. S., 97; *Weyerhauser vs. Minnesota*, 176 U. S., 550; *Hager vs. Reclamation District*, 111 U. S., 701.

"In the late case of *Security Trust & Safety Vault Co. vs. The City of Lexington*, 203 U. S., 323, decided at the last term of this court, the subject underwent consideration, and it was there held that before an assessment of taxes could be made upon omitted property, notice to the taxpayer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.

In that case it was further held that where the procedure in the State Court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied."

"Applying the principles thus settled to the statutory law of Georgia, as construed by its highest court, does the system provide due process of law for the taxpayer in contesting the validity of taxes assessed under its requirements?"

In *Londoner vs. Denver*, 210 U. S., 385, which involved the validity of an assessment for a local improvement, Mr. Justice Moody, dealing with the sufficiency of the hearing accorded by the legislature said:

"In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance and not form. But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount; and upon whom it shall be levied, and of making its assessment an apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of

which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. * * * It must be remembered that the law of Colorado denies the land owner the right to object in the courts to the assessment, upon the ground that the objections are cognisable only by a board of equalization. If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. *But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal. Pittsburg, etc. Railway Co. vs. Backus*, 154 U. S., 421, 426; *Fallbrook Irrigation District vs. Bradley*, 164 U. S., 112, 171. It is apparent that such a hearing was denied to the plaintiffs-in-error. * * * The assessment was therefore void, and the plaintiffs-in-error were entitled to a decree discharging their lands from a lien on account of it."

In City and County of Denver vs. State Investment Co., 49 Col., 244, 112 Pacific Rep., 789, 33 L. R., N. S., 395, which follows *Londoner vs. Denver* (*supra*), the court said:

"Unless the law authorizing the assessment expressly or by implication, provides for notice to the owner of the property to be affected, and gives him an opportunity to be heard at a specified time and place, before board or tribunal competent and ready to administer proper relief, concerning the correctness of the charge, before it is made conclusive, the constitutional guaranty that no person's property shall be taken without due process of law has been infringed. *Brosen vs. Denver*, 7 Col., 395, 3 Pac., 455. Notice or citation of the time and place for hearing, or possibly a waiver thereof by the property owner, was therefore essential to vest in the counsel the power to create a valid lien for the cost of the improvement, and it was likewise essential that the hearing be before a tribunal competent to act. *The denial to a party in such a case of the right to appear and to be fully heard is, in legal effect, a recall of the citation to him. Windsor vs. McVeigh*, 93 U. S., 274. * * * A judgment, finding or decree rendered under such circumstances is an arbitrary edict without the sanction of law. As stated by Brannon, in his work on the 14th Amendment, page 251: '*Though there be service of process, yet, if the defendant is not allowed to make his defense, it is a withdrawal of the summons, "a denial of the benefit of a notice, and would in effect be to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether," because judgment without hearing is void.*' * * * *It certainly cannot be said that*

a party has had a hearing when he has been called to appear, or appears, before a tribunal with power to act and grant relief, and which recognizes that such party is entitled to the relief for which he prays, yet disclaims in itself power and authority in the premises, and refuses to hear evidence and act upon the matter. The right to property and the guaranty that it shall not be taken without due process of law, does not rest upon a basis so unsubstantial."

In *Wetmore vs. Karrick*, 205 U. S., 141, Mr. Justice Day said:

"To sanction a proceeding, rendering a new judgment without notice at a subsequent term, and hold that it is a judgment rendered with jurisdiction, and binding when set up elsewhere, would be to violate the fundamental principles of due process of law as we understand them, and do violence to that requirement of every system of enlightened jurisprudence which judges after it hears and condemns only after a party has had an opportunity to present his defense."

In *Ochoa vs. Hernandez*, 230 U. S., 161, Mr. Justice Pitney said:

"Without the guaranty of 'due process' the right of private property cannot be said to exist in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in

that charter (*Coke*, 2 *Inst.*, 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In *Riverside Mills vs. Menefee*, 237 U. S., 189, Chief Justice White said:

"That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement. * * * And that a corporation no more than an individual is subject to be condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in *Pennoyer vs. Neff*, is also established by the cases referred to and many others."

In *Pennington vs. Fourth National Bank*, 243 U. S., 270, 273, while recognizing the jurisdiction which a State possesses over property within its borders, regardless of the presence of the owner, Mr. Justice Brandeis said:

"The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings and the opportunity of the owner to be heard."

Saunders vs. Shaw (244 U. S., 317), further illustrates the doctrine which underlies the present case. It was there held to be a violation of due process of law for a State Supreme Court to reverse a case and render judgment absolute against the party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion or proper opportunity to introduce his evidence.

In *Coe vs. Armour Fertilizer Works* (237 U. S., 413), this Court further indicates, in language clearly applicable to the case at bar, what kind of a hearing is necessary to constitute due process of law. The Armour Fertilizer Works recovered a judgment against Parrish Vegetable and Fruit Company, a corporation, before a State Court in Florida, and thereupon, after a return of *nulla bona* upon the writ of execution against the defendant company, and upon the application of the plaintiff under the statutes of the state issued an execution against Coe, a stockholder in the defendant company, and attached his lands in an endeavor to apply them in satisfaction of the judgment against the corporation, to an amount equal to the amount remaining unpaid upon his subscription to the corporate stock. He thereupon filed a petition to quash the execution against his land, alleging that it had been issued without notice to him and amounted to the taking of his property without due process of law, and that the statute permitting it was void, as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

The State Court quashed the execution for other reasons than the unconstitutionality of the statute.

The Court of Appeals of Florida, reversed the judgment of the lower court below. The case went back to the court of original jurisdiction, with a mandate that such further proceedings be had in the cause as, according to right, justice, the judgment of the Supreme Court, and the laws of Florida ought to be had. On the hearing the Court without further pleadings or evidence on either side, rendered judgment, denying the motion to quash. Coe took his writ of error to the Supreme Court of Florida, which sustained the judgment of the lower Court; whereupon a writ of error to this Court was sued out.

Upon a motion to dismiss the writ of error on the ground that the plaintiff-in-error had failed to take a writ of error upon the first judgment of the Supreme Court of Florida, and that he was therefore precluded from taking a writ of error upon the last judgment of that Court, in order to raise the Federal question, this Court found that the Supreme Court of Florida, had considered the Federal question in its second judgment, and that the writ of error therefore was properly brought. In this connection Mr. Justice Pitney said:

“The statement in the second opinion, that the attack of plaintiff-in-error upon the constitutionality of the act was ‘by a proceeding unknown to our practice,’ does not, we take it, mean that the court not necessarily pass upon the constitutional question. We are not sure we clearly comprehend the meaning of the expression quoted, in view of the effect at-

tributed to §§ 1624 and 1625 in this case and in earlier decisions cited below. *It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed 'due process of law.'* The constitutional guaranty is not to be thus evaded, and we cannot believe there was any purpose to evade it in this case. Upon the whole, the right to review this court is clear, and the motion to dismiss the writ of error must be denied."

Upon the main question in the cause, whether the taking of the stockholders' property was in accordance with due process, and as to the nature of a notice and hearing consistent with the due process clause of the Federal Constitution, the opinion proceeds at page 421, et seq.:

"We understand, therefore, that in the present case the court held that under §2677, as amended in 1909, on a return of 'no property' upon an execution against a corporation, an execution may be issued against any stockholder without notice to him or other preliminary step; that the writ is to be enforced against his property to the extent of his unpaid subscription to the stock that he holds in the company, and this amount the officer ascertains from the custodian of the records of the corporation, in accordance with §2678; that if

the person against whom the execution is issued is not in fact a holder of stock upon which there is an unpaid subscription, or if the amount of the execution exceeds the unpaid subscription, he may have relief under §§1624 or 1625; and that, in the absence of such objection on his part, the execution is enforced, although there may have been only a formal levy, without even such notice to the owner of the property as might be implied from a forcible seizure or an interference with his possession.

"Thus construed, and as applied in this case, we think §2677 is repugnant to the 'due process of law' provision of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation, and in our opinion the other sections do not adequately supply the defect.

"It may be conceded that a judgment recovered against a corporation, without fraud or collusion in a court having jurisdiction over the subject matter and the party, may consistently with the Fourteenth Amendment be treated as concluding the stockholder respecting the existence and amount of the indebtedness so adjudged * * *. But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, *he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as wheth-*

er the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defences personal to himself."

"The suggestion that because under §§1624 and 1625, a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder *after the execution issues and before interference with his possession or his property right*, therefore plaintiff-in-error, having been at liberty in this proceeding to raise meritorious questions, is not 'within the class who may justly complain,' will not withstand critical analysis.

"The statute mentions no classes, and the State Court merely distinguished between those who complain and those who do not. Against one and all, execution may be issued without notice or hearing; the judgment against the corporation, and the record of stockholdings and stock subscriptions found upon the books of the corporation, being treated as conclusive against those named as stockholders. If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or receiving it makes no objection, his property is taken in satisfaction of the corporation's debt—manifestly without due process of law. But, it is said, plaintiff-in-error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended.

The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff-in-error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Reese vs. Watertown*, 19 Wall., 107, 123.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart vs. Palmer*, 74 N. Y., 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefitted, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court * * *.

"*The writ of execution cannot of itself be treated as equivalent to a writ of attachment, establishing a lien upon the stockholders' property, but going no further until he has had an opportunity to show cause why that property should not be applied to the payment of the corporation's debt. Not only is such a purpose wholly unexpressed in the writ, but such*

is not its normal question or office, no 'day in court' is named and there is no provision for notice or mention by service publication mailing, or otherwise."

See also

Greig vs. Ware, 25 Col., 184; 55 Pac., 163;
Riglander vs. Star Co., 98 App. Div.
 (N. Y.), 101.

(b) *The contention of the defendants-in-error that the foreign attachment laws of Delaware derive their existence from the Custom of London and date from the Colonial Period, even if sound cannot avail as against the prohibition of the Fourteenth Amendment.*

1. *The Delaware statute as interpreted does not provide the safeguards that constituted the essential features of the Custom of London.*

The Custom of London, on which the defendants-in-error justify the legislation of Delaware which is now under discussion, probably contained the germ of the idea from which resulted legislation in the various States of the Union relative to foreign attachment. It will be found, however, on careful examination, that the English prototype was substantially varied in American procedure, so that, although there is a resemblance between the practice locally pursued in London and that followed in the United States, there is, nevertheless, a substantial difference between them.

In the Appendix to this brief will be found excerpts from *Drake on Attachment* as to the origin,

nature and objects of the remedy of attachment, in which the Custom of London is considered and the differences between it and the American law of attachment are pointed out.

It may be of historical interest to study the practice that prevailed in the Mayor's Court of the City of London in cases of foreign attachment. The forms adopted are to be found in the Appendix to *Sergeant on Foreign Attachment*.

As shown by *Locke on Foreign Attachment*, as well as by the works of Drake, Sergeant and Shinn on the subject, all attachments under the Custom of London were grounded on actions of debt. The person named as defendant was first summoned to appear at the Guildhall at the same or the next term at which the summons was issued, to answer the plaint of the plaintiff. If the Sergeant at Mace returned that the defendant had nothing within the liberties of the City of London, by which he could be summoned, nor was to be found within the liberties of the City, and the person named as defendant, being solemnly called at that court, made default, and the Court being informed by the plaintiff that any other person within the city was indebted to the defendant, the Court, on the plaintiff's petition, ordered the Sergeant at Mace to attach the defendant named for such sum in the hands and custody of such other person, so that the defendant should be and appear at the next court to be held at the Guildhall of London to answer to the plaintiff of and in the pleas in the plaint originally specified. If the Sergeant at Mace at such court returned that by virtue of such precept he had attached the defendant by the sum so in custody of such other person, in order that

the defendant should appear at the same court to answer the plaintiff of and in the pleas, and the defendant should then at that court and at three other courts thereafter next severally to be held, that is to say, at four several courts, should fail to appear when solemnly called on the petition of the plaintiff and should make default, the plaintiff, after the recording of such four defaults, might petition the court that it warn and cause to be made known to the other person in whose hands and custody the sum of money had been attached to appear at another court at the Guildhall to show if he knew of ought to say wherefore the plaintiff ought not to have execution of the sum in his hands attached. If the person so attached appeared in his proper person and acknowledged that he at the time of such attachment owed and until then had and detained from the defendant the sum of money in his hands thus attached, and the plaintiff, in his proper person, had sworn his debt, the plaintiff should then have execution of the sum so attached on giving at least two pledges, to be found by the plaintiff, to restore the sum so attached and had in execution to the defendant if the latter within a year and a day then next following should there come and disprove and avoid the debt.

In the introduction to *Locke on Attachment* it is shown that, in 1834, a commission was appointed to inquire into the conditions of the Custom of London. Sir Francis Palgrave was one of the Commissioners. In their report the commissioners said:

"The summons, the return of *non est inventus*, the four separate defaults on being

called in court, are indeed entered formally upon the record; and there is no doubt that unless they were so entered in every case, the judgment against the garnishee would be erroneous; for the Custom itself would be contrary, not only to the common law, but to the first principles of justice, if it sanctioned a proceeding against a man or his property without notice."

But even without these minute preliminaries, it is evident that the statute of Delaware fails to provide the essential safeguards practiced under the Custom of London. There, the very commencement of the proceedings the plaintiff was required to make an affidavit of his debt, and to file it in court and enter it upon the record. The action accompanied by the affidavit was regarded as the foundation of the process.

Locke on Foreign Attachment *3.

Under the Delaware statute, as interpreted by the court, the writ of attachment was to be issued upon affidavit made by the plaintiff, or some other credible person, that the defendant resides out of the State and is justly indebted to the plaintiff in the sum exceeding \$50. In the present case the affidavit was not made by the plaintiffs, but by one Joyce, whose identity or knowledge of the facts nowhere appears. His deposition was a bare statement that the defendant was indebted to the plaintiffs in the sum exceeding \$50, and on this sole foundation bail was required by the plaintiffs in the sum of \$200,000.

Such an incongruity was impossible under the Custom of London, as was likewise the monstrosity that the plaintiff should have the right of arbitrarily fixing the amount of bail to be given by the defendant as is permitted by the Delaware statute.

The defendants in error contend that they were not called upon to file a *navv.* or declaration on the issuance of the writ of attachment, although such a document was subsequently filed. The statute does not provide for such filing. Consequently, under the interpretation that has been given to the statute in the present case, a stranger to the controversy may file a simple affidavit that the defendant is indebted to the plaintiff in a sum exceeding \$50, and the latter may then require the defendant to give bail in any sum that he may choose to name as the condition upon which defendants's right to appear and defend comes into being.

The following variances between the Delaware statute and the Custom of London may be noted:

FIRST.—Under the latter the defendant could either render his body and person or give security to pay the debt demanded.

SECOND.—He could then bring a writ of *scire facias* to put the plaintiff on proof of his claim.

THIRD.—If the debt was not due by bond, bill or specialty he might wage his law and thereupon discharge himself of the claim made against him.

FOURTH.—After judgment by default and before the award of execution the plaintiff was bound to give bond, with sureties, that if the de-

fendant should within a year and a day come into court and disprove or avoid the debt demanded against him he would restore to the defendant the money condemned in the garnishee's hands.

FIFTH.—The plaintiff was also compelled to give a second bond to prosecute his original bill.

SIXTH.—The plaintiff also swore positively and definitely to the amount of his claim, such affidavit constituting the foundation of the action, and which could be set aside for insufficiency.

SEVENTH.—Money only could be attached. Consequently a bond to return the money realized was a complete indemnity against loss. Shares of stock could not be seized. Consequently the defendant did not incur the danger of a sacrifice of his property by sale under the attachment. It is also to be borne in mind that the bond required of the plaintiff was given before the award of execution instead of after the sale as under the Delaware statute.

—It is thus evident that the Delaware statute does not find support in the Custom of London. But even if, at the time of its enactment it were to be regarded as a statutory adoption of the local law of London relative to foreign attachment, it ceased to be valid when the Fourteenth Amendment went into effect, especially in view of the departure in the other States of the Union from the practice of permitting property to be seized in foreign attachment without affording the defendant an opportunity to appear and litigate the plaintiff's claim even though no security for the payment of any judgment that might be recovered

was given. That such general practice if of great importance has been frequently pointed out in the decisions of this Court.

The attachment laws of Delaware, so far as can be gathered, were originally taken from the legislation of Pennsylvania (*Reybold vs. Parker*, 6 Houston [Del.], 544, 553), although there had been previous legislation on the subject in the Colony of New York (*Duke of York's Laws* [1664], page 10). The authorities relied upon by defendants-in-error are largely Pennsylvania decisions. As early as in 1836, however, as is shown in *Sergeant on Foreign Attachments*, pages 24, 25, the legislation of that State was amended by the enactment that any defendant in an attachment, instead of giving bail or security, may at his election, at any time before judgment obtained in the attachment, cause an appearance to be entered for him and defend the action, in which case the action is to proceed as if commenced by a summons. The attachment, however, is to continue to bind the estate or effects attached as in other cases, unless judgment be rendered for the defendant in such attachment. If, however, it be rendered for the plaintiff the attachment is to have the like force and effect as in the case of an action commenced by summons.

In *Martin vs. Dryden*, 1 Gilman (Illinois), 211, decided in 1844, in which Abraham Lincoln was counsel, it was claimed that the appearance and plea by a defendant in an attachment suit discharged the property levied upon from the attachment. The claim was, however, rejected, the Court saying:

"For this effect reliance is had upon the 29th section of the attachment law, which authorizes the defendant to appear and plead without giving bail or entering into bond. But the same section further provides that if defendant desires to replevy he shall execute bond and security that the property and credits attached shall be produced and delivered subject to the judgment, and in that case the attachment shall be dissolved; or a bond that he will pay the amount of the judgment and costs within ninety days after its rendition will in like manner dissolve it."

So, in New Jersey, by an amendment adopted in 1871, shortly after the Fourteenth Amendment went into effect, the attachment laws against absconding or absent debtors were amended by permitting a defendant to appear without bond, in which case, however, the lien of the writ remains.

Watson vs. Noblett, 65 N. J. Law, 506.

Goldmark vs. Magnolia Metal Co., 65 N. J. Law, 341.

Cord vs. Neulin, 71 N. J. Law, 428.

The law of New York has long been to the same effect (Code of Civil Procedure, Sections 635 to 696, particularly Sections 682 to 691). The legislation of these four States is typical of that which prevails elsewhere. It accomplishes the primary purpose of attachment laws, that of securing the appearance of a defendant, and at the same time effectuates the secondary object of securing for the plaintiff a lien on the property of the defendant,

which continues until it is dissolved either because the statutory prerequisites to a valid attachment have not been complied with or in consequence of the giving of a bond by the defendant for the purpose of procuring a dissolution of the attachment. This procedure conforms with the constitutional test of due process of law. It affords a defendant the right to a hearing before his property is condemned. It enables him to respond to the citation that summons him to court without the imposition of an onerous or impossible condition.

The right of a defendant to enter an appearance in an attachment proceeding without dissolving the attachment and the effect of such an appearance under the modern interpretation of the attachment laws, which is (1) to give notice to the defendant to enable him to appear and defend the proceeding and (2) to afford to the plaintiff the security of the property seized for the payment of any judgment that he may eventually recover, are fully considered in Volume 1 of *Shinn on Attachment and Garnishment*, §§95, 191, 221, 442 and 449.

2. Even if it were assumed that the Delaware statute was in exact conformity with the Custom of London, there has been such a departure from it in the general legislation of the several States, that it must be regarded as opposed to the genius of our institutions.

If the general course of legislation on a particular subject may of itself be regarded as justifying an argument in support of the constitutionality of such legislation (*Capital Traction Co., vs. Hof*, 174 U. S., 43; *Lemieux vs. Young*, 211 U. S., 493;

Rast vs. VanDeman & Lewis, 240 U. S., 363, 364), then an equally potent argument in favor of the unconstitutionality of a statute may be deduced from the fact that it is opposed to the general trend of legislation on the subject-matter to which it relates.

We are not contending that there is any constitutional objection to the remedy of foreign attachment as it is usually practiced in the United States. All that we insist upon is that, where a plaintiff undertakes to seize the property of a defendant by attachment or garnishee process, before judgment, the defendant must have the right, if he desires to avail himself of it, to appear and defend in the proceeding for the protection of his rights. An examination of the attachment laws of the several States, with the exception of Delaware, if exception there be, shows that they confer such right to appear and defend, which may be exercised unconditionally. It is only where the defendant seeks to discharge his property from the lien of the attachment and to secure possession of the property which is made the subject of the attachment or garnishment, that he is required to give a bond to secure the plaintiff.

Even under the laws of Delaware it is expressly provided that a foreign corporation against which foreign attachment proceedings are instituted, may appear and defend without giving special bail, the lien of the attachment being unimpaired unless the defendant elects to give a bond. This is either a legislative recognition that the conferring of such a right is essential to due process or it constitutes a denial to a natural person of the equal protection of the laws as argued under Point II:

3. *In any event, there is such a repugnancy between the Delaware statute, as interpreted, and the Fourteenth Amendment that the latter must be regarded as having modified the statute so as to eliminate the unconstitutional features of the law.*

That this is permissible is a well recognized principle in constitutional law.

It is admirably illustrated by *Neal vs. Delaware*, 103 U. S., 370, where the operation of the Fourteenth and Fifteenth Amendments upon the Constitution and Laws of Delaware existing prior to their adoption was determined. The essential question presented was whether citizens of the African race, otherwise qualified, were, by reason of the Constitution and Laws of Delaware, excluded from service on juries because of their color. The State Court, all the judges concurring, held that no such exclusion was required or authorized by the Constitution or Laws of the State. The correctness of this position was then considered, Mr. Justice Harlan speaking for the Court:

“The Constitution of Delaware, adopted in 1831 (the words of which upon the subject of suffrage had not been changed when the petition for removal was filed, nor since), restricts the right of suffrage at general elections to free white male citizens, of the age of twenty-two years and upwards, who had resided in the State one year next before the election, and the last month thereof in the County where he offers to vote, and who, within two years next before the election, had paid a County Tax, which shall have been assessed

at least six months before such election—the pre-requisite of a payment of tax being dispensed with in the case of free white male citizens between twenty-one and twenty-two years of age, having the prescribed residence in the State and County. The only persons excluded by that Constitution from suffrage are those in the military, naval, or marine service of the United States, stationed in Delaware, idiots, insane persons, paupers, and those convicted of felonies.

“The Statute of Delaware, adopted in 1848, and in force at the trial of this case, provides for an annual selection, by the Levy Court of the County, of persons to serve as grand and petit jurors, and from those so selected the Prothonotary and Clerk of the Peace are required to draw the names of such as shall serve for that year, if summoned. It further provides that all qualified to vote at the general election, being ‘sober and judicious persons,’ shall be liable to serve as jurors, except public officers of the State or of the United States, Counsellors and Attorneys-at-Law, Ordained Ministers of the Gospel, Officers of Colleges, Teachers of Public Schools, Practising Physicians and Surgeons regularly licensed, Cashiers of Incorporated Banks, and all persons over seventy years of age.

“It is thus seen that the statute, by its reference to the constitutional qualifications of voters, apparently restricts the selection of jurors to white male citizens, being voters, and sober and judicious persons. And although it only declares that such citizens shall

be liable to serve as jurors the settled construction of the State Court, prior to the adoption of the Fifteenth Amendment, was that no citizen of the African race was competent, under the law, to serve on a jury.

"Now, the argument on behalf of the accused is, that since the statute adopted the standard of voters as the standard for jurors, and since Delaware has never, by any separate or official action of its own, changed the language of its Constitution in reference to the class who may exercise the elective franchise, the State is to be regarded in the sense of the amendment and of the Laws enacted for its enforcement, as denying to the colored race within its limits, to this day, the right, upon equal terms with the white race, to participate as jurors in the administration of justice, and this notwithstanding the adoption of the Fifteenth Amendment and its admitted legal effect upon the Constitution and Laws of all the States of the Union.

"But to this argument, when urged in the court below, the State Court replied, as does the Attorney General of the State here, that although the State had never, by a convention, or popular vote, formally abrogated the provision in its State Constitution restricting suffrage to white citizens, that result had necessarily followed, as matter of law, from the incorporation of the Fourteenth and Fifteenth Amendments into the fundamental law of the Nation * * *.

"Beyond question, the adoption of the Fifteenth Amendment had the effect, in law, to

remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election. The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or Statutes. In this case, that presumption is strengthened, and, indeed, becomes conclusive, not only by the direct adjudication of the State Court as to what is the fundamental law of Delaware, but by the entire absence of any statutory enactments or any adjudication, since the adoption of the Fifteenth Amendment, indicating that the State, by its constituted authorities, does not recognize, in the fullest legal sense, the binding force of that amendment, and its effect in modifying the State constitution upon the subject of suffrage."

See also

Ex parte Yarbrough, 110 U. S., 665.

Guinn vs. United States, 238 U. S., 363.

In *Kentucky Railroad Tax Cases*, 115 U. S., 321-334, in order to save a taxing law from the criticism that it was unconstitutional because it did not give the taxpayer a hearing, Mr. Justice Matthews said:

"And if the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statute will be construed together as one law. This was the principle of construction applied by this court, following the decisions of the State court, in *Neal vs. Delaware*, 103 U. S., 370, where words, denying the right, were regarded as stricken out of the State Constitution and statutes, by the controlling language of the Constitution of the United States; and in the case of *Cooper vs. The Wandsworth Board of Works*, 14 C. B. N. S., 180, in a case where a hearing was deemed essential, it was said by Byles, J., 'that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.' "

In *East St. Louis vs. Amy*, 120 U. S., 600, a municipal charter which authorized the borrowing of money not to exceed \$100,000 and limited its power of special taxation to pay interest and provide a sinking fund to three mills on the dollar of assessment, and which went into effect in March, 1869, was followed by an amendment to the Con-

stitution of the State, which took effect in August, 1870, which forbade municipal corporations from incurring indebtedness to an amount exceeding five per cent. on the value of the taxable property and required them to provide for the collection of an annual tax sufficient to pay the interest on the debt as it fell due and to pay and discharge the principal within twenty years from the time of its contraction. The municipality, acting under its charter, refused to collect a tax as directed by the Constitution. On mandamus to compel the collection of the tax, it was decided that the Constitution removed from the charter the limitation upon the power of the municipality to tax for the payment of any bonded indebtedness that might thereafter be incurred. Chief Justice Waite said:

"The principle on which this decision rests is the same as that acted on in *Neal vs. Delaware*, 103 U. S., 370, where this court held that the Fifteenth Amendment of the Constitution of the United States, of itself, and without any action by the State, rendered inoperative a provision of the Constitution of Delaware which limited the right of suffrage to the white race, and this accorded with the opinion of the Supreme Court of the State in the same case. * * * This provision for the tax was written by the Constitution into every law passed thereafter by the legislature allowing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay debts thereafter incurred under old authority which were inconsistent with its requirements. It was

made by the people a part of the fundamental law of the State that every debt incurred thereafter by a municipal corporation, under the authority of law, should carry with it the constitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment."

Of like import is *Kaukauna Co. vs. Green Bay Canal*, 142 U. S., 254, where proceedings were instituted to condemn riparian rights on a navigable stream under the provisions of a statute enacted in 1848. Objection was taken to the procedure on the ground that it violated the due process clause of the Fourteenth Amendment. As against this objection it was contended that the Amendment was not adopted until 1868, and therefore had no application to the statute. Disposing of that contention, this Court held that proceedings under a State statute enacted before the adoption of the Fourteenth Amendment, which, if taken before its adoption, would not have violated the Constitution, may, when taken after its adoption, violate it, if prohibited by that Amendment.

In the terse language of Mr. Justice Brown:

"It was not the act itself which deprived the water power company of its property, but the proceedings taken under that act, and so far as such proceedings were taken subsequent to the constitutional amendment, they fall within its inhibition."

In *Wilkins vs. Jewett*, 139 Mass., 29 (29 N. E. Rep., 214), an action was brought to recover one-

half of the cost of a partition wall pursuant to the provision of a Colonial Law enacted in 1692-1693 regulating the erection of buildings with stone or brick in the town of Boston. It provided that "every person building as aforesaid with brick or stone shall have liberty to set half his partition wall in his neighbor's ground, so that he leave toothing in the corners of such walls for his neighbor to adjoin unto, who, when he shall build, such neighbor adjoining shall pay for one-half of the said partition wall, so far as it shall be built against." It was held that this enactment, being repugnant to the principles of the Constitution subsequently adopted, was of no force, Chief Justice Morton saying:

"The provision in question undertakes to deal with private property and to authorize one man to appropriate and use the property of another without his consent. It assumes to take private property without due process of law and without compensation. It is repugnant to the fundamental principles declared in the Declaration of Rights, that the property of the subject shall not be appropriated, even for public use, without paying him a reasonable compensation therefor, and that he shall not be deprived of his property but by the judgment of his peers or the law of the land, and that in all controversies concerning property he shall have a right to trial by jury."

The principle announced by Mr. Justice Brandeis in *Hamilton vs. Kentucky Distilleries Co.*, 251 U. S., 162, is likewise applicable here:

"That a statute valid when enacted may cease to have validity owing to a change of circumstances has been recognized, with respect to state laws, in several rate cases. *Minnesota Rate Cases*, 230 U. S., 352, 473; *Missouri Rate Cases*, 230 U. S., 474, 508; *Lincoln Gas Co. vs. Lincoln*, 250 U. S., 256, 268. That the doctrine is applicable to acts of Congress was conceded *arguendo* in *Perrin vs. United States*, 232 U. S., 478, 486; and *Johanson vs. Georgia*, 234 U. S., 422, 446. In each of these cases Congress had prohibited the introduction of liquor into lands inhabited by Indians, without specified limit of time; in one case the prohibition was in terms perpetual; in the other it was to continue 'until otherwise provided by Congress.' In both cases it was contended that the constitutional power of Congress over the subject-matter necessarily was limited to what was reasonably essential to the protection of the Indians. * * * In both cases the court, while assuming that since the power to impose a prohibition of this character was incident to the presence of the Indians and their status as wards of the Government and did not extend beyond what was reasonably essential to their protection, it followed that a prohibition valid in the beginning would become inoperative when in regular course the Indians affected were completely emancipated from federal guardianship and control * * *."

See also

Municipal Gas Co. vs. Public Service Commission, 225 N. Y., 89, 95-97.

(c) *The authorities principally relied upon by defendants in error do not sustain their position.*

(1.) Great stress is laid on the decision of Mr. Justice Curtis in *Murray vs. Hoboken Land and Improvement Co.*, 18 How., 272-280, and reliance is placed on his remark, that to ascertain the meaning of due process of law "we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

It would suffice to say that it is not pretended that the procedure which is attacked in the present case was taken from the common or statute law of England or represented the settled usage and mode of procedure of England. At the most it was merely a local custom of a single community, the City of London. Moreover, whatever may have been the early application of that custom in the United States, it was found unsuited to the civil and political conditions prevailing in most of the States because the law and practice relating to foreign attachment was so modified as to confer upon a defendant the right to appear and defend without the giving of a bond such as is required by the law of Delaware. Furthermore, we contend that the mere fact that the Delaware statutes were an adaptation of the Custom of London, does not in and of itself stamp upon the procedure which it embodies the character of due process of law. It certainly was not immemorially the law of the land, but even if it had been, that in itself would not have made it the equivalent of due process.

It is submitted that, if a statute of a State is subject to objections under the Fourteenth Amendment by reason of its terms, provisions or authorized procedure thereunder, the statute or the proceedings cannot be saved by showing that something similar to the statute had been in force, either at common law or by early statute in England and that the Colonists had brought over the idea with them and embodied it in their laws.

The language of Mr. Justice Matthews in *Hurtado vs. California*, 110 U. S., 516, and of Mr. Justice Moody in *Twining vs. New Jersey*, 211 U. S., 78, strongly support the contention that ancient usage does not in and of itself give the character of due process of law to a given course of procedure, any more than a failure to pursue such ancient practice deprives a newly created procedure of the character of due process of law.

Said Mr. Justice Matthews:

"But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stam upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. This would be all the more singular and surprising in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions of England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally."

Equally striking are the words of Mr. Justice Moody:

"It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment."

Reverting to the decision in *Murray vs. Hoboken Land and Improvement Company*, it at once becomes apparent that the nature of the proceeding considered in that case differed essentially from a suit in foreign attachment. That was not an attempt to exercise judicial, but merely executive or administrative, power. Swartwout, as collector of customs for the port of New York, gave an official bond as required by law. His accounts were audited and it was found that he was indebted to the Government for a large sum. Thereupon, pursuant to the statute and what was claimed to have been the procedure in like cases uniformly followed by the Crown in respect to the enforcement of their official duties by the collectors of the royal revenues of England, a warrant was issued for the seizure and sale of Swartwout's land, without resorting to any court. These proceedings were purely *ex parte*. The Court was careful to declare in express terms that the treasury officials whose action resulted in the sale of the property, were purely ministerial officers armed with no judicial power whatever. The opinion declares:

"It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings."

The action was justified on the strength of English precedents as a purely executive or administrative act sanctioned by common usage and exceptional in character.

A minute and interesting review of this decision will be found in *Taylor on Due Process of Law*, §100 where the historical correctness of the premises on which the opinion rests is ably considered.

It is also to be observed that in the opinion of Mr. Justice Curtis it was pointed out that due process generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings. The most important of these essentials have been disregarded in the interpretation given by the Supreme Court of Delaware to the attachment laws of the State here under review.

(2.) *McMillen vs. Anderson*, 95 U. S., 37, another of the cases cited below by defendants-in-error, involved the enforcement of a license tax fixed by statute as payable by retail mer-

chants and retailers of spiritous liquors. The plaintiff in error was chargeable with the payment of the license fees imposed by the statute. He did not pay, and thereupon the defendant, the tax collector, seized his property, just as a sheriff would have seized it for the enforcement of a judgment. The plaintiff brought an action for trespass, and in the same action sued for and procured a temporary injunction restraining the sale of his property. In order to obtain such injunction it was necessary for him to give an injunction bond for twice the amount of the taxes the collection of which he sought to enjoin. On the trial judgment was rendered in favor of the defendant and the liability of the plaintiff and his sureties on the bond given was enforced. He could have tested the validity of the statute imposing the license in an action for trespass, but he chose also to obtain an injunction. Under the practice which universally prevails he was required to give a bond to protect the defendant against the expenses involved in defending against the injunction. He, as actor, was seeking affirmative relief in equity, although he had another adequate remedy, and was merely required to comply with the uniform practice applicable to the granting of a temporary injunction.

In *Kentucky Railroad Tax Cases*, 115 U. S., 332, it was pointed out that the language of *McMillen vs. Anderson*, was used in the decision of a case in reference to a license tax, where all the circumstances of its assessment were declared by statute and nothing was entrusted to the discretion of public officers. It therefore involved no matter as to which notice or a hearing would have been of the

slightest possible benefit. There was nothing as to which an issue could have been raised. There was nothing to be determined or decided.

On the other hand that notice and an opportunity to be heard with respect to taxes other than license fees which are for a fixed amount, are essential to the validity of a tax, has been frequently decided.

Hagar vs. Reclamation District, 11 U. S., 709.

Spencer vs. Merchant, 125 U. S., 345.

Palmer vs. McMahon, 133 U. S., 669.

Paulson vs. Portland, 149 U. S., 330.

Hodge vs. Muscatine County, 196 U. S., 276.

(3.) *Central Loan and Trust Co. vs. Campbell*, 173 U. S., merely decided that an attachment against the property of a non-resident defendant violated no constitutional right.

We have never questioned the validity of such a statute. Nor do we contend that a statute requiring a bond as a condition to the dissolution of an attachment would be void. The plaintiff-in-error has not sought a dissolution. He has merely asked to be permitted to appear and defend the claim made against him, as the basis of the seizure of his property. Our insistence, is simply, that when a defendant is sued and his property is attached in the suit, he has the absolute right to appear in the action and to defend the claim made against him and his property without first giving a bond of the character required in the present case. If the Delaware statute has

been so framed, as has been contended by the defendants-in-error, as to make the appearance and the interposition of an answer to the action by the defendant to operate as a dissolution of the attachment, then so much the worse for the statute. A defendant cannot be deprived of his day in court merely because a plaintiff has undertaken to seize all of his property by attachment. If the statute conferring the right to attach is so framed as to make the exercise by the plaintiff of his constitutional right to be heard nugatory because his appearance and answer would accomplish the dissolution of the attachment, then it is incumbent upon those who seek to attach property of non-residents to see to it that the attachment laws are amended so as to protect the plaintiff and at the same time to preserve the fundamental rights of the defendant.

We are willing to admit that even in the absence of such legislation, a defendant who appears and answers without giving the bail which the statute requires to be given in order to bring about the dissolution of an attachment, would be estopped from asserting that such dissolution would be brought about by the mere fact of appearance and answer. The modification of the Delaware attachment laws, resulting from the adoption of the Fourteenth Amendment, can well be regarded as a recognition of the right to appear and answer so far as the defendant is concerned, and a preservation of the lien of the attachment until security is given so far as the plaintiff is concerned.

Doe vs. Factors Insurance Co., 166 Ala.,
63.

(4.) In *Capitol Truaction Co. vs. Hof*, 174 U.S., 1, jurisdiction was conferred on the justices of the peace in the District of Columbia by a law passed in 1867, to try cases where the amount involved did not exceed \$100. Acting on the well-established principle that there is no absolute right of appeal in any case, the statute provided that no appeal should be allowed from a judgment of a justice of the peace unless the appellant, with sufficient surety or sureties approved by the justice, entered into an undertaking to satisfy and pay all intervening damages and costs arising on the appeal. By a subsequent act the amount of the jurisdiction of the court was increased to \$300, and it was further provided that no appeal should be allowed from the judgment of a justice of the peace unless the matter in demand in the action or pleaded in set off thereto exceeded the sum of \$5, nor unless the appellant, with sufficient surety approved by the justice, entered into an undertaking to pay and satisfy whatever final judgment might be recovered in the appellate court. It was contended that the requirement to enter into such an undertaking was unconstitutional, because the only method in which the claim could be tried by a jury according to the common law and the Constitution was by removing the action from the justice of the peace into the Supreme Court of the District of Columbia.

Even assuming that trial by jury in the justice's court was not a trial before such a jury as is required by the Federal Constitution, nevertheless there was a trial and a judicial investigation as to the merits of the cause in the justice's court.

There was due process. The defendant had notice and an opportunity to be heard, and was in fact heard. The requirement of a bond as a condition to the taking of an appeal obviously did not interfere with due process of law. Nor, in view of the uniform procedure in the various States of the Union, was such a requirement an unreasonable obstruction of the right of trial by jury.

In support of this latter proposition, the opinion shows that similar procedure prevailed in at least sixteen of the States. Mr. Justice Gray further said:

"The legislature, in distributing the judicial power between courts of record, on the one hand, and justices of the peace or other subordinate magistrates, on the other, with a view to prevent unnecessary delay and unreasonable expense, must have a considerable discretion, whenever in its opinion, because of general increase in litigation, or other change of circumstances, the interest and convenience of the public require it, to enlarge within reasonable bounds the pecuniary amounts of the classes of claims entrusted in the first instance of the decision of justices of the peace, provided always the right of trial by jury is not taken away in any sense in which it is secured by the Constitution. Having regard to the principles and to the precedents applicable to this subject, we should not be warranted in declaring that the act of Congress of 1895 so unreasonably obstructs the right of trial by jury that it must for this reason be held to be unconstitutional and void."

Had the statute in the case cited prevented the defendant from appearing and pleading in the justice's court without first giving security for the payment of any judgment that might be recovered against him, then an exact parallel to the present case would have been presented. The defendant was, however, permitted to appear and defend.

(5.) The law of distress, on which defendants-in-error rely, presents no parallel.

Anderson vs. Henry, 45 W. Va., 319, 31 S. E. Rep., 998, one of the cases cited, clearly shows that the right of a landlord to distrain the goods of his tenant had long existed at common law. The distress warrant was not a judicial process. In fact, at common law, the landlord himself, without warrant, seized the tenant's goods. If the tenant disputed the right of distress, he could either proceed in an action for trespass, or trover, or replevin. In the latter case it would naturally be incumbent on him to comply with the ordinary procedure regulating such an action. The tenant would then be the plaintiff and the landlord the defendant.

This is made clear in the opinion of Mr. Justice Cowen in *Connah vs. Hale*, 23 Wend., 462, and of Mr. Justice Clifford in *Fowler vs. Rapley*, 15 Wall., 328, 332, 334.

II.

The Delaware Statute deprived the plaintiff-in-error of the equal protection of the laws, since, under the interpretation given to it, he was debarred from appearing and defending without first giving special bail, whilst under the express terms of the statute a foreign corporation may appear and answer without the necessity of giving bail.

Whilst undoubtedly it lies within the legislative power to classify the subjects and objects of legislation, it is nevertheless equally well settled that the classification may not be arbitrary and capricious. It must be at least based on some reason and not merely create discrimination in favor of one class and against another. It is impossible to understand on what theory a foreign corporation whose property is attached may appear and defend in a foreign attachment suit without giving bail of any kind, whilst a natural person who is a non-resident of Delaware is to be precluded from appearing and defending his property in the foreign attachment suit unless he gives special bail in such amount as the plaintiff may require. To require special bail of a foreign corporation is less apt to involve hardship than it is to require such bail from a natural person, yet the former is relieved of the necessity of complying with the requirement which is exacted from the latter.

As pointed out in the opinion of Chief Justice Pennewill, speaking for the Court *in banc* in the present case, the hardship of this legislation rests as much upon an individual of small means as upon

one of large means whose property is so situated as to be unavailing as security.

Can it be that the Legislature of Delaware undertook to make one law applicable to corporations with large means and another to natural persons with comparatively limited means? That would be the natural inference when one reads Sections 4142 and 4143 placed in juxtaposition in the Revised Code of Delaware. Every argument that justifies the exemption of a foreign corporation from the giving of a bond as a condition to the right to appear and defend, applies with equal force in favor of a natural person.

Cotting vs. Kansas City Stock Yards Co.,
183 U. S., 79.

Connolly vs. Union Sewer Pipe Co., 184
U. S., 540, 560.

Gulf, Colorado & Santa Fe Ry. vs. Ellis,
165 U. S., 150.

People ex rel. Farrington vs. Mensching,
187 N. Y., 8.

The recent decision in *Fort Smith Lumber Co. vs. Arkansas*, 251 U. S., 532, is not in its circumstances like the present case. Some argument was perhaps possible there for sustaining the policy which would tax corporations on shares held in other local corporations without subjecting individuals to the same tax. Even there, Justices McKenna, Day, Van Devanter and McReynolds dissented. It is inconceivable, however, that any argument can be deduced from that decision in support of the discrimination that exists in the Delaware statute now under discussion.

However, in *F. S. Royster Guano Co. vs. Virginia*, 252, U. S., —, 40 Sup. Ct. Rep., 560, it was held that an act of Virginia, insofar as it imposed on a domestic corporation doing business both within and outside the State a tax with respect to its income derived from sources outside the State, denied such corporation the equal protection of the laws in view of the fact that a subsequent statute exempted domestic corporations doing any part of their business in the State from any tax on their income. The two statutes were regarded as parts of one and the same law, which, by their combined effect, required one class of corporations to pay a tax upon the income derived from business done without as well as from that done within the State, while the other class of corporations similarly deriving income from business done without the State but none from business within the State was exempt from taxation. Recognizing the right of the Legislature to classify, Mr. Justice Pitney said:

“But the classification must be reasonable, not arbitrary, and must rest upon ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. . . . Nevertheless a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. . . . It

is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation."

In *Bogni vs. Perotti*, 224 Mass., 152, 112 N. E. Rep., 853, the constitutionality of a statute that provided, in substance, that the property right to labor of any individual or number of individuals associated together shall not be recognized in equity as property when assailed by a labor combination, save in exceptional circumstances, was passed upon. It was adjudged that this statute was void because it deprived the plaintiffs of the equal protection of the laws. The reasoning of Chief Justice Rugg is peculiarly applicable to the proposition with which we are now dealing:

"That a man cannot resort to equity respecting his property right to work in the ordinary case simply because he is a laboring man, and that he cannot have the benefit of an injunction when such remedies are open freely to owners of other kinds of property, need scarcely more than a statement to demonstrate that such man is not guarded in his property rights under the law to the same extent as others.

If a laborer must stand helpless in a court while others there receive protection respecting the same general subject which is denied to him, it cannot be said with a due regard to the meaning of constitutional guaranties that he is afforded 'the equal protection of the laws' within the 14th Amendment to the Constitution of the United States and similar pro-

visions of our own Constitution. The right to make contracts to earn money by labor is at least as essential to the laborer as is any property right to other members of society. If as much protection is not given by the laws to this property, which often may be the owner's only substantial asset, as is given other kinds of property, the laborer stands on a plane inferior to that of other property owners. Absolute equality before the law is a fundamental principle of our own Constitution. To the extent that the laborer is not given the same security to his property by the law that is granted to the landowner or capitalist, to that extent discrimination is exercised against him. It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights, without discrimination, by the same process against those who wrong him as are open to every other person. The courts must be open to all upon the same terms. No obstacles can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law."

See also,

In re Flukes, 157 Mo., 125;

In re Opinion of Justices, 211 Mass., 618;

98 N. E. Rep., 337;

Johnson vs. Goodyear Mining Co., 127

Cal., 4;

American DeForest Wireless Tel Co. vs. Superior Court, 153 Cal., 533;
People vs. Sholem, 238 Ill., 203.

In *Phipps vs. Wisconsin Central R. Co.*, 133 Wisc., 153, the Court employed the following language, most pertinent to the present case:

"There is no substantial distinction between individuals pursuing their remedies in the courts of justice, and corporations. The one is entitled to the same rights, remedies, and privileges as the other. There is no ground for classification in this regard. The very object of the constitutional provisions, state and federal, are to place them upon an equality before the law in maintaining and defending their rights in the courts. There is no apparent natural reason suggested by necessity, no such difference in the situation and circumstances between the classes in the legislation in question as to suggest the propriety of the discrimination, and therefore the statute allowing examination of the former employee of a corporation, and denying such right in case of an individual, is in violation of the Fourteenth Amendment of the United States Constitution, and Section 1, Art. 1 of the State Constitution."

III.

The judgment of the Supreme Court of Delaware should be reversed with instructions to dismiss this action.

LOUIS MARSHALL,
 of Counsel for Plaintiff-in-Error.

APPENDIX.

Excerpts from Chapter 1 of Drake on Attachment as to the Origin, Nature and Objects of the Remedy by Attachment.

SECTION 1. The preliminary attachment of a debtor's property, for the eventual satisfaction of the demand of a creditor, is unquestionably a proceeding of great antiquity. Whether the statement of Mr. Locke, in his Treatise on the Law of Foreign Attachment in the Lord Mayor's Court of London, ascribing its origin to the Roman law, be capable of exact verification, need not now detain us. It is sufficient for the present purpose, that, so far as its use in the United States is concerned, we have no difficulty in finding its origin in the custom of Foreign Attachment of London, which is agreed by all authorities to have a very ancient existence. This, with other customs of that city, has, from time to time, been confirmed by Royal Charters and Acts of Parliament, and is declared "never to become obsolete by non-user or abuser." It is a singular incident of those customs, that "they may be and are certified and are recorded by word of mouth; and it is directed that the mayor and aldermen of the city, and their successors, do declare by the Recorder whether the things under dispute be a custom or not, before any of the King's justices, without inquest by jury, even though the citizens themselves be parties to the matter at issue; and being once recorded, they are afterwards judicially noticed." We accordingly find the custom of Foreign Attachment certified by Starkey, Recorder of London, as early as 22 Edward IV to

be "That if a plaint be affirmed in London, before, &c., against any person, and if it be returned nihil, if the plaintiff will surmise that another person within the city as a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for said debt; and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff."

§2. The custom thus set forth was, it is believed, first treated of in an orderly manner by Mr. Bohun, in a work entitled "Privilegia Londoni; or the Rights, Liberties, Privileges, Laws, and Customs of the City of London;" of the third edition of which a copy, printed in 1723, is before me; in which the author remarks: "It may be here observed, that although the Charters of the City of London (as they are here recited by 15 Car. II) do begin with those of William I, yet it must not be understood as if any of the city rights, liberties, or privileges were originally owing to the grants of that prince. For, 'tis evident, the said City and Citizens had and enjoyed most of the liberties and privileges mentioned in the following charters (besides divers others not therein enumerated) by immemorial usage and custom long before the arrival of William I."

§3. This custom, notwithstanding its local and limited character, was doubtless known to our an-

cestors, when they sought a new home on the Western continent, and its essential principle, brought hither by them, has, in varied forms, become incorporated in the legal systems of all our states; giving rise to a large body of written and unwritten law, and presenting a subject of much interest to legislatures and their constituents, as well as to the legal profession and their clients. Our circumstances as a nation have tended peculiarly to give importance to a remedy of this character. The division of our extended domain into many different states, each limitedly sovereign within its territory, inhabited by a people enjoying unrestrained privilege of transit from place to place in each state, and from state to state; taken in conjunction with the universal and unexampled expansion of credit, and the prevalent abolishment of imprisonment for debt; would naturally, and of necessity, lead to the establishment, and, as experience has demonstrated, the enlargement and extension, of remedies acting upon the property of debtors. The results of this tendency, in the statute law of several states, may be discovered by reference to their leading statutory provisions, as found in the Appendix; while those connected with the judicial administration of the law appear in the succeeding chapters of this work.

§4. In its nature this remedy is certainly anomalous. As it exists under the custom of London, it has hardly any feature of a common law proceeding. At common law the first step in an action, without which no other can be taken, is to obtain service of process on the defendant; under the custom, this is not only not done, but it was declared by Lord Mansfield, that the very essence

of the custom is that the defendant shall not have notice. At common law a debtor's property can be reached for the payment of his debt, only under a *fieri facias*; under the custom, it is subjected to a preliminary attachment, under which it is so held as to deprive the owner of control over it, until the plaintiff's claim can be secured or satisfied. At common law only tangible property can be subjected to execution; under the custom, a debt due to the defendant is attached, and appropriated to the payment of his debt. At common law, after obtaining judgment, the plaintiff is entitled to execution without any further act on his part; under the custom, he cannot have execution of the garnishee's debt, without giving pledges to refund to the defendant the amount paid by the garnishee, if the defendant, within a year and a day, appear and disprove the debt for which the attachment is obtained.

In these and other respects the proceeding under the custom has an individuality entirely foreign to the common law. Its peculiar features have in the main been preserved in its more enlarged and diversified development in this country. *The most material differences as it exists among us, are, the necessity of notice to the defendant, either actual or constructive; the direct action of the attachment on tangible property, as well as its indirect effect upon debts, and upon property in the garnishee's hands; the necessity for the presentation of special grounds for resort to it; and the requirement of a cautionary bond, to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment.*

Still the remedy is, with us, regarded and treated as *sui generis*, and is practically much favored in legislation, though frequently spoken of by courts as not entitled to peculiar favor at their hands.

§4a. Nothing more distinctly characterizes the whole system of remedy by attachment, than that it is—except in some states where it is authorized in Chancery—a special remedy at *law*, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it; and that where, from a conflict of jurisdiction, or from other cause, the remedy by attachment is not full and complete, a court of equity has no power to pass any order to aid or perfect it.

§5. Under the custom, and likewise in this country, attachment is in the nature of, *but not strictly*, a proceeding in rem; since that only is a proceeding in rem in which the process is to be served on the thing itself, and the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever. *The original object of the London proceeding was by attachment of the defendant's property instead of his body, to compel his appearance by sufficient sureties to answer the plaintiff's demand.* The practice of summoning him at the commencement of the proceeding, if it ever prevailed, was, in all probability, found to interfere with the advantage intended to be given by the attachment, and was, therefore, discontinued; but though the defendant is in fact never summoned, still the record of the

proceedings in the Mayor's court must contain the return of nihil, or it will be erroneous and void. All the notice, therefore, which the defendant there has of the proceeding, is derived through the attachment of his property; and herein is the leading difference between the London proceeding and ours. *With us, the writ of attachment is always accompanied or preceded by a summons, which, if practicable, is served on the defendant; if not, he is notified by publication of the attachment of his property. If the summons be served and property be attached, the latter, unless special bail be given, is held for the payment of such judgment as the plaintiff may recover, and that judgment is in personam, authorizing execution against any property of the defendant, whether attached or not. If the summons be served, but no property attached, the suit proceeds as any other in which the defendant has been summoned, unaffected by its connection with a fruitless attachment. If property is attached, but there be no service on the defendant, and he does not appear, publication is made, which brings the defendant before the court for all purposes, except the rendition of a *personal* judgment against him; and the cause proceeds to final judgment, but affects only what is attached; and the judgment will not authorize an exception against any other property, nor can it be the foundation of an action against the defendant; nor can the plaintiff take judgment for a greater amount than that for which the attachment issued, nor for any other cause of action than that stated in the publication. If there be neither service upon the defendant nor attachment of his property, there is nothing for the jurisdiction to rest upon, and any pro-*

ceedings taken in the cause are coram non judice and void; even though the statute law of the state expressly authorize a judgment to be rendered against a defendant under such circumstances. *Another essential difference between the two proceedings is, that while under the custom the defendant cannot appear and defend the action without entering special bail, such is not the case with us. Here it is optional with him to give security for the payment of the debt or not; but in either event he is generally allowed to appear and defend. If he give the security, the same result follows as under the custom—, the dissolution of the attachment, the release of the attached property, and the discharge of the garnishee; if not, the property is the security, and remains in custody.*



Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM—A. D. 1920.

No. 99.

JAMES A. OWNBEY,
Plaintiff-in-Error,
—against—

**JOHN PIERPONT MORGAN, WILLIAM P. HAMIL-
TON, HERBERT L. SATTERLEE and LEWIS C.
LEDYARD, as Executors of the Estate of JOHN
PIERPONT MORGAN, Deceased,**
Defendants-in-Error.

**BRIEF AND ARGUMENT FOR DEFENDANTS-
IN-ERROR.**

**WRIT OF ERROR TO THE SUPREME COURT OF THE STATE
OF DELAWARE.**

WILLARD SAULSBURY,
HARLAN F. STONE,
Of Counsel for Defendants-in-Error.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 99.

JAMES A. OWNBEY,
Plaintiff-in-Error,
—against—

JOHN PIERPONT MORGAN, WILLIAM P. HAMILTON, HERBERT L. SATTERLEE, and LEWIS C. LEDYARD, as Executors of the Estate of JOHN PIERPONT MORGAN, Deceased,
Defendants-in-Error.

**WRIT OR ERROR TO THE SUPREME COURT
OF THE STATE OF DELAWARE.**

BRIEF AND ARGUMENT FOR DEFENDANTS-IN-
ERROR.

Statement.

WHAT HAPPENED IN THE STATE COURT.

The executors of J. P. Morgan found among the assets of his estate obligations of James A. Ownbey, the plaintiff-in-error here, aggregating approximately Two Hundred Thousand Dollars.

As was their duty, they endeavored to collect the amounts due, and learning that the debtor, who was a

non-resident of the State of Delaware, was possessed of shares of stock in The Wootten Land and Fuel Company, a Delaware corporation, they began proceedings in the Superior Court, December twenty-third, 1915, by attaching this stock under the Foreign Attachment Law of Delaware, filing the necessary affidavit (Record, p. 10) and indicating the amount of Special Bail required to answer their demand. The affidavit with the amount of bail thereon is in the usual form.

Under the attachment so issued, the Sheriff of New Castle County attached the stock (33,324 1-3 shares) belonging to Ownbey in said Company.

Morgan's Executors filed a declaration, a statement of the cause of action, January 17, 1916.

Instead of entering Special Bail as required by the Delaware Statute, Ownbey, the defendant, through his attorneys, attempted March 2nd, 1916, to enter a common appearance and to file pleas to the Declaration.

On March 13, 1916, attorneys for Morgan's Executors moved to strike the pretended appearance, pleas and docket entries from the Record (p. 16 of Record).

Ownbey's attorneys March 21, 1916, filed a reply (so-called) to the motion to strike off the appearance and defense, which Morgan's attorneys also moved be stricken from the files of the Court, and defendant Ownbey, not having entered Special Bail, Morgan's attorneys on March 27, 1916, pursuant to Sections 20 and 28, Chapter 126, being Sections 4137 and 4145 of the Delaware revised Code, moved for interlocutory judgment collectible from the property attached, and that the amount of judgment be ascertained by Inquisition at Bar.

On April 5, 1916, the Court (Record, p. 23) ordered the attempted appearance for Ownbey, the docket entries of appearance by his attorneys, the "paper writings

containing pretended pleas and reply to plaintiff's motion be stricken from the files of the Court" and ordered interlocutory judgment entered in favor of Morgan's Executors against Ownbey "collectible only from the property attached, * * * the amount of said judgment to be ascertained by Inquisition at Bar."

The Court in making this order did so because (Record, p. 23) "special bail or security required by the Statute of the State of Delaware in suits instituted by Writs of Attachment has not been given or entered in said Attachment by the said defendant, or any person for him."

This ruling was approved by opinion of the Court in Banc (in opinion subsequently affirmed by the Supreme Court) as follows (Record, p. 53):

"The court are clearly of the opinion that in a foreign attachment suit against an individual, there can be no appearance without entering special bail; indeed, the entering of bail constitutes defendant's appearance. Defendant has produced no case in conflict with this conclusion;"

The effect of permitting such appearance, without special bail, all the judges agreed, would be to discharge the attachment, the action would become one *in personam* and the lien of attachment would be destroyed, a result, said the court, which "surely the legislature did not contemplate" (Record, p. 53, et seq.).

On May 2, 1916, Ownbey filed a petition to open said interlocutory judgment and the Court issued a rule to show cause why the prayer of the petition should not be granted, the judgment opened and Ownbey permitted to appear. This rule was served on attorneys for Morgan's Executors, who, on May 25, 1916, were granted leave by the Court to appear specially for the purpose

of moving to quash and set aside the return of the rule, which motion was duly entered, with the further motion on the same day that petition of Ownbey's attorneys be stricken from the files of the Court and the rule to show cause discharged and the order directing its issuance vacated. The Court on the 25th day of May, 1916, ordered these matters to be heard before the Court in Banc.

The Court in Banc in Delaware consists of the five law Judges who sit in the Supreme Court and the matters to be heard before them by order of the Superior Court (the Court of first instance) were the motions of the attorneys for Morgan's Executors hereinbefore recited and shown on the order of the Court (p. 33 of the Record). The Court in Banc, May 29th, 1916, decided that the motion of attorneys for Morgan's Executors to discharge the rule, &c., should be granted and this opinion certified to the Superior Court was complied with by that Court (pp. 34 and 35 of the Record).

The Inquisition at Bar to ascertain the amount due to Morgan's Executors from Ownbey was made, taken and returned in open Court on May 29th, 1916, before a Jury duly impaneled and their return, duly signed by the foreman and members of the jury (Record, pp. 35 and 36) determined the amount due from Ownbey to Morgan's Executors to be \$200,168.57.

On November 29th, 1916, the Court ordered that so many of the shares attached should be sold as would be sufficient to satisfy the debt, interest and costs of the Morgan judgment. But on December 11, 1916 (incorrectly stated "1915," p. 40 of Record), before such sale Ownbey, through his attorneys, sued out a Writ of Error to the State Supreme Court.

On June 20, 1917, the Supreme Court granted a motion of the attorneys for Morgan's Executors to

strike certain entries, proceedings, petitions, &c., from the Record sent up, and, after argument, it appearing to Supreme Court of the State of Delaware that there was no error in the records and proceedings of the Superior Court in the cause, on March 21, 1919, the Supreme Court affirmed the judgment below and remitted the cause to the Court Below for further proceedings.

The judgment of the Supreme Court of the State of Delaware comes to the Supreme Court of the United States on Writ of Error with nine assignments of error (Record, pp. 2 to 5, inclusive). Ownbey, the plaintiff in error, asserts that he is deprived of his property without due process of law and denied the equal protection of the laws.

The Court here will perceive from the record of the State Courts that judgment was obtained in the cause by Morgan's Executors only after the most strenuous opposition by Ownbey and his attorneys. The efforts of Ownbey's attorneys were directed to placing upon the record of the cause in the State Courts appearances, motions, petitions and affidavits which the Courts uniformly ruled to be improper and to be stricken from the record.

If Ownbey and his attorneys really desired to appear in the cause in the State Courts, it is curious that they should have tried in so many wrong and unprecedented ways to make their appearance, when under the foreign attachment laws of Delaware a plain, easy and certain way is provided for such appearance. This is by giving special bail and the Superior Court, the court of first instance, is authorized by Statute to settle and fix the amount of such bail, which to prevent excessive bail being demanded, may, if not agreed upon by the parties, be fixed "to the satisfaction of the Court" and limited by the Court "to the value of the property . . . attached and the costs."

Foreign attachment proceedings under the Delaware Laws are simple, straightforward and well settled by a practice established for more than three hundred years. Hardship caused by the possible demand for excessive bail is provided against, and, if the plaintiff-in-error desired to appear, he could have availed himself of the well-known and easily followed route to an appearance in the cause and have contested the claims of Morgan's Executors before the Court and Jury.

As the Court here will appreciate from the brief recital of what occurred in the State Courts, the efforts of attorneys for Morgan's Executors were directed in a very great measure to preserving as far as possible an unincumbered record there, and these efforts were approved by the Judges of the Court of first instance, by all the law Judges in the Court in Banc, and finally by the Supreme Court of the State.

The due, orderly and historic processes of the law were followed and in no respect was Ownbey, the plaintiff-in-error here, denied the equal protection of the law. All the Statutes of the State of Delaware, under and pursuant to which Ownbey's stock was attached, showing the course of a foreign attachment proceeding from inception to conclusion, are hereinafter set out.

DELAWARE STATUTES ON FOREIGN ATTACHMENT.

It is confidently submitted that should the Supreme Court of the United States hold the Delaware Statutes, providing for the attachment of property of a non-resident to secure the appearance of such person in suits, and the proceedings and orders of the Delaware Courts in this case to violate the provisions of the Fourteenth Amendment, no case in law or cause in Equity begun by attachment of property or *capias*, in which a defend-

ant is held to special bail in accordance with the settled and historic procedure in Courts of law and equity, can be anywhere upheld as constitutional.

The Delaware Statute (Revised Code, 4142) provides:

"A writ of foreign attachment may be issued against any person not an inhabitant of this State, * * * upon affidavit made by the plaintiff, or some other credible person, and filed with the Prothonotary, that the defendant resides out of the State, and is justly indebted to the said plaintiff in a sum exceeding fifty dollars."

The situs of stock in Delaware Corporations is in Delaware.

Delaware Revised Code 1986 (Sec. 72):

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State whether organized under this Chapter or otherwise shall be regarded as in this State."

Ownbey held his stock subject to this provision.

See Jellenik v. Huron Copper Co. (1900) 177 U. S. 1.

The Revised Code, Sec. 4145, provides:

"The said Writ shall be framed, directed, executed and returned, and like proceedings had, as in the case of a domestic attachment, except as to the appointment of auditors and distribution among creditors; for every plaintiff in a foreign attachment shall have the benefit of his own

discovery, and, after judgment, may proceed, by order of sale, *fieri facias*, *capias ad satisfaciendum* or otherwise, as on other judgments.

"Provided, that before receiving any sum under such judgment, the plaintiff shall enter into recognizance as required by section 18 preceding."

Section 18 above referred to is Revised Code Sec. 4135:

"Provided, that before any creditor shall receive any dividend, or share, so distributed, he shall, with sufficient surety, enter into recognizance to the debtor, before the Prothonotary, in a sufficient sum, to secure the repayment of the same or any part thereof, if the said debtor shall, within one year thereafter, appear in the said Court and disprove or avoid such debt, or such part thereof.

"The proceeding for this purpose may be by motion to the Court, and an issue framed and tried before the same."

The property of a non-resident defendant being so attached, he may appear and have his property discharged from the attachment under Revised Code, Sec. 4123:

"If the defendant in the attachment, or any sufficient person for him, will, at any time before judgment, appear and give security to the satisfaction of the plaintiff in such cause, or to the satisfaction of the court and to all actions brought against such defendant, to the value of the property, rights, credits and monies attached, and the costs, then the garnishees and all property attached shall be discharged. The security may be taken thus: 'On the.....day of..... 19.., A. B. becomes surety in the sum ofthat C. D. shall answer the demand of E. F. in this suit, and shall satisfy any judgment to the extent of the value of the property attached, that may be recovered against him therein'; which entry, on the appearance docket, shall be signed

by the security, and shall be an obligation of record of the same force and effect, and subject to the same remedy by an action of debt, as any other obligation for the payment of money may be."

Revised Code, Sec. 4137, provides:

"Judgment shall be given for the plaintiff in the attachment the second term after issuing the writ, unless the defendant shall enter special bail as aforesaid; whereupon, the Court shall make an order that the sheriff shall sell the property attached, on due notice, and pay the proceeds (deducting legal costs and charges) to the auditors for distribution."

Argument.

FIRST POINT.

If the bail demanded by the plaintiff in the attachment below had been excessive, it would have been reduced and fixed at the proper amount, by the Court to *its* satisfaction, on the application of the defendant.

A sufficient answer to any claim of the plaintiff-in-error that the amount of bail endorsed on the writ by the plaintiffs was exorbitant and that by reason thereof the defendant was, by the act of the plaintiffs, prevented from appearing by special bail, is given by the judgment rendered after inquisition at bar.

The record here shows that the amount of bail demanded, Two Hundred Thousand Dollars (\$200,000),

was insufficient, rather than excessive, as is evidenced by the amount of the judgment ascertained by inquisition at bar, viz: Two Hundred Thousand One Hundred Sixty-eight Dollars and fifty-seven cents (\$200,168.57). But aside from this it was within the power of the court from which the attachment issued, at any time, under the authority of Section 4123 of the Revised Code of Delaware, as well as within the power which all courts have to prevent the abuse of their process, to reduce the bail required to a reasonable amount if it could be shown to be excessive or unreasonable or not demanded in good faith.

Section 4123 of the Revised Code provides in part:

"If the defendant in the attachment, or any sufficient person for him, will, at any time before judgment, appear and give security to the satisfaction of the plaintiff in such cause, or *to the satisfaction of the court* and to all actions brought against such defendant, to the value of the property, rights, credits and monies attached, and the costs, then the garnishees and all property attached shall be discharged."

The defendant in Attachment proceedings need suffer no hardship because the plaintiff demands excessive bail for if the bail demanded is more than is warranted by the cause of action or by the value of the property attached simple application to the Court would give the necessary relief. If the plaintiff cannot be satisfied by the defendant as to the security, the defendant may ask that the Court fix the security "to the satisfaction of the Court" and "to the value of the property * * * attached."

On complying with the order of the Court, the property is discharged, the defendant pleads and defends as in cases begun by summons.

No such application was made by the defendant below. Instead, he attempted to appear without entering bail in any amount whatsoever. If he could have shown that he was wronged for any reason by the amount of bail demanded, the Court below, on proper application, had abundant power to grant relief.

Judge Shippen in *Vienne v. McCarty* (1785), 1 Dallas 154, said:

"The first point to be considered in this case, is, whether the court think themselves authorized to inquire into the cause of action in the case of attachments, as they do in cases of *capias*, where the defendant's person is taken into custody? The reason of inquiring into the cause of action on writs issued against the person, is to prevent a vexatious plaintiff from imprisoning the body of the defendant without cause. In the case of attachments, though the reason may not perhaps be so forcible, as the personal liberty of the defendant is more precious than his property, yet the abuse of the process of law may be as great, and the necessity of providing against a wanton and groundless seizure of the defendant's effects, as obvious. In the case of specific articles attached, a stranger's ship, or other effects, may be taken out of his hands, and detained for such a length of time as to ruin his voyage, and embarrass his affairs beyond redress. So, in case of debts attached, his property may be locked up, his remittances prevented, and the injury nearly as great in the other case. The bail marked by an attorney, or a malicious plaintiff, may be out of all bounds disproportioned to the debt; and if there was no way of examining into the justice or extent of the demand, a defendant might be at the mercy of the plaintiff, to be ruined at his pleasure. *All these mischiefs may be prevented, without injury to any one, by an inquiry made by the Court into the*

cause of action, in the same manner that it is every day done in cases of capias; and we think the spirit of the law, and sound reason, point out the necessity of such an interposition."

To the same effect are:

Campbell v. Morris (Md. 1797), 3 Har. & M. 535, 552.

Watts v. Taylor (N. Y. 1816), 13 Johns. 305.

Bunting v. Brown (N. Y. 1816), 13 Johns. 425.

If the value, market or otherwise, of the stock attached was at the time of the attachment, for any reason whatsoever, less than the sum of \$200,000 the defendant was at liberty under the Statute to show that fact to the Court in mitigation of bail. Instead of doing this the attorneys for the defendant below elected to endeavor to appear without entering special bail and to support defendant's alleged right so to appear by arguing that the bail marked on the writ was disproportionate to the debt and that the available value of the Stock attached was less than the sum of \$200,000.

The Supreme Court of Delaware has determined that the proceedings to judgment prescribed by the Statutes cited were duly followed in this case. This is not denied by plaintiff-in-error. That determination reduces the contention here to the sole question,—do the Delaware Statutes properly proceeded on, violate the provisions of the Fourteenth Amendment and deprive a person, circumstanced as is this plaintiff-in-error, of his property without due process of law or deny to him the equal protection of the laws.

While the case was in the Supreme Court of Delaware, the Legislature by Act (approved March 23, 1917) amended (R. C., Sec. 4145) the attachment law by substituting for that section the following:

"4145, Sec. 28. The said Writ of Foreign Attachment shall be framed, directed, executed and returned, and like proceedings had, as in case of a domestic attachment, except that as to any such suits instituted subsequently to January 1st, 1915, at any time before January 1st, 1918, an appearance may be entered for the defendant, and defense made, without entry of security for the discharge of such attachment, at any time before the execution of the order of sale, or the writs of *fieri facias*, *capias ad satisfaciendum*, or otherwise, as hereinafter provided, and any judgment which may have been entered upon any such suit shall, upon entry of such appearance and petition to the Court by the said defendant, through his attorney, be reopened and the defendant let into a trial. And on and after January 1st, 1918, the defendant in any such attachment, at any time before judgment by default in said case, may cause an appearance to be entered and defense made without entry of security for the discharge of such attachment. In all such cases like proceedings may be had as in a case begun by summons, provided that the lien upon the property seized under said writs of foreign attachment shall in no respect be disturbed or affected by the entry of such an appearance, defense and proceedings thereupon as hereinabove provided, but shall remain as security *pro tanto* for the satisfaction of any personal judgment secured against a defendant so entering an appearance, for every plaintiff in a foreign attachment shall have the benefit of his own discovery, and after judgment may proceed by order of sale, *fieri facias*, *capias ad satisfaciendum*, or otherwise, as on other judgments; provided further, that in such suits upon foreign attach-

ment, there shall be no appointment of auditors for distribution among creditors; and provided further, that in case no appearance has been entered, as by this section provided, in said cause, the plaintiff, before receiving any sum under his judgment in foreign attachment, shall enter into recognizance, as required by Section 18."

From the description of what occurred in the State Courts and from a reading of the State attachment laws it is seen that the foreign attachment proceeding in Delaware is an orderly, logical and proper proceeding, fully sanctioned by the decisions of the Supreme Court of the United States.

On affidavit filed by a plaintiff that a non-resident is indebted to him in a sum exceeding fifty (\$50.00) dollars, Court of first instance issues its writ and takes into custody whatever property of the non-resident the Sheriff can find in the County. This is a proper action on the part of the Court, for in *Pennoyer v. Neff* (1877), 95 U. S. 714, 722, it is said:

"Every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power * * * to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred."

The seizure of the property, taking it into the custody of the Court, gives the Court its jurisdiction, to the extent of the property attached, to determine the liability of the non-resident owner of the property to the attaching creditor. The seizure is notice to the owner to come in and defend, and this is sufficient notice that the Court has taken jurisdiction *in rem*.

"The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the Court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." *Pennoyer v. Neff*, *supra*, at p. 727).

The owner of the property seized may defend in the manner provided by the laws of the State when his property is in *custodia legis*. The defendants-in-error have not finished this action even when the Supreme Court of the United States decides this case in their favor. They must give bond when the proceeds of the judicial sale are turned over to them and the defendant then can show they are not his creditors if within a year thereafter he appears in Court and disproves the debt.

SECOND POINT.

The real purpose of the effort of the defendant below to enter a general appearance was to transform the action from a proceeding *in rem* to an action *in personam* and thus free the attached property from the attachment.

The only reasonable explanation of the manner in which Ownbey's Attorneys conducted the case in the courts below is that the desire and the object of defendant below was, and the object of the plaintiff-in-error here is, to free his property from the lien of the attachment of Morgan's Executors. Ownbey's attorneys

made no application to the court below to enter a special or qualified appearance to defend only as to the property attached. Nothing but a general appearance which would change the action *in rem* to an action *in personam*, thus discharging the property affected and making the judgment a general judgment, unsecured by the attached property, would satisfy them. They made no application to the court to reduce the bail demanded or to ascertain the value of the property attached and to require only security equal to such value.

To satisfy them the attachment had to be discharged and the property released.

The Delaware Court could not permit the pretended appearance of Ownbey by his Attorneys to stand, for by so doing the action would have been changed to an action *in personam* and the plaintiffs would have lost their lien on the stock attached. They would have had what was only equivalent to personal service on Ownbey, his property would have been released and free for transfer, and, when they had obtained a personal judgment against him they could have pursued him over the United States in a fruitless effort to find some property belonging to him out of which to collect their judgment. This was precisely what happened in *Ticmans v. Schley*, (Va. 1830), 2 Leigh 25, where the plaintiff, having permitted the defendant to enter his appearance without giving special bail, lost the benefit of his attachment and was unable to satisfy his judgment.

All the law judges of the Supreme Court of the State of Delaware, sitting in the Court *in Banc* rendered their opinion without dissent as follows (Record, p. 53):

"The defendant argues that the statute has a two-fold aspect, viz:

"1. To compel an appearance; and 2, to give the plaintiff a lien on the property attached for the payment of his claim.

"While we think the purpose of the statute was to accomplish both of those things, we do not think the two things are separate and independent. The one must be dependent on the other, for otherwise entering an appearance would destroy the lien and advantage of the attachment. *Surely the legislature did not contemplate such a result.*

"*The defendant insists that an appearance would not necessarily discharge the attachment, but we are wholly unable to agree to that proposition.* He admits that an appearance by the defendant would change the action from one *in rem* to one *in personam*. If that be so then it must follow that the attachment which exists because the action is *in rem* is lost when the action becomes an ordinary personal action, unless the lien is saved by a provision such as is found in our statute respecting foreign corporations. That statute has been cited in support of defendant's argument that the lien of the attachment would remain even if there is a general appearance. But it seems to the court that such an inference is unwarranted because the fact that the attachment is saved by the language of the act respecting foreign corporations even though there is an appearance, indicates that it would not be saved, in case of appearance, by the act respecting individuals which contains no such language.

"But in case of appearance without giving security, any judgment recovered by the plaintiff would be a general judgment, and for that reason also the lien of the attachment would be lost. It is hardly arguable that such a judgment, or an execution issued thereon, would be a special lien on the property seized under the attachment."

Ownbey, the plaintiff-in-error, stated under oath (Record, p. 24) that the property attached "represented

substantially the entire property and assets" of which he was possessed.

Had the Court below permitted the general appearance for Ownbey to stand, Morgan's Executors would have lost the benefit of their discovery and industry, and while theoretically successful would have had only an uncollectible judgment, and thus the remedial and effective jurisdiction of the court would have vanished, the actual jurisdiction over the *res* having been destroyed.

If this Court reverses the judgment of the Delaware Court, the same result will follow.

THIRD POINT.

By settled procedure of the Common Law, a defendant cannot plead in bailable actions until he has appeared by giving bail.

Sellon's Practice, Volume I, p. 91, says:

"Appearance is necessary in all cases, because the defendant must be in court before his attorney can plead, or take any steps on his behalf, * * *."

This is self evident. It was this principle that moved the Court below to strike the pretended pleas from the files. Its action is sustained by authority.

Tidd's Practice, Volume 1, page 463, says:

"In bailable actions, however, the defendant cannot regularly plead in bar, until the bail are perfected; and if he plead before, his plea may be considered as a nullity, although the bail afterwards justify. And where the plaintiff declared *de bene esse*, and the defendant pleaded in abatement before he had put in special bail, and the plaintiff, treating his plea as a nullity, signed

interlocutory judgment, the court held it to be regular."

The Court of King's Bench in the case of *Venn v. Calvert* (1792), 4 Term Rep. 578, sustains the law as stated by Tidd. The full report of this case is as follows:

"In this case the declaration was delivered *de bene esse*, and the plea was filed before the bail were perfected; after the bail had justified, the plaintiff signed judgment as for want of a plea.

"*Baldwin* obtained a rule to set aside this judgment, because a plea was filed at the time when the judgment was signed.

"*Shepherd* shewed cause against this rule; contending that the defendant was not entitled to take any step in the cause till he had justified bail; and that the plea which was filed before that time was a nullity. And he cited *Cook v. Racen*, where it was held that a demand of a plea before the defendant had appeared, or the plaintiff filed common bail for him, was a nullity.

"Lord Kenyon, Ch. J. The question is, whether the perfecting of bail, which did not take place till after the plea was filed, shall make the plea a good one from the time of perfecting bail? We think not. As the plea was a nullity at the time when it was filed, it did not become a good plea by perfecting the bail afterwards. The case which has been cited goes a great way to determine the present."

In *Saunders v. Owen* (1822), 2 Dowling & Ryland, 232, the Court of King's Bench again re-affirmed this principle, the entire report of this case being as follows:

"The plaintiff having declared *de bene esse*, and demanded plea, the defendant pleaded in abatement within the four days allowed him, but at that time had not put in special bail; he did afterwards put in and perfect special bail, and

notwithstanding this, the plaintiff treated his plea as a nullity, and signed interlocutory judgment.

"Reader moved to set aside the interlocutory judgment, and contended, that the demand of a plea waived the bail, and that the time when the bail was put in and perfected, must have reference to the day when it ought to have been put in, by the rules and practice of the Court.

"Walford, contra, urged, that the defendant could not be considered as in Court, until bail had been put in and perfected, and therefore he could not take advantage of any premature step of the plaintiff, until he was himself in Court.

"The Court was of this opinion; and held, that the interlocutory judgment was regularly signed. Rule discharged, with costs."

That this has continued to be the settled practice in actions in which bail is required sufficiently appears from the authorities cited in the Fourth Point of this brief. It will suffice, therefore, to call attention at this point to the comparatively late case of *Bergkopski v. Ruzofski*, 74 Conn. 204, decided in 1901. In this case, bail was required of the defendant pursuant to the Revised Statutes of Connecticut (Sections 956 and 957 of the Revision of 1888, Sections 5902, 5903 of the Revision of 1918). The defendant attempted to appear specially and plead in abatement without giving the required special bail and on motion of the plaintiff the defendant's attempted appearance was stricken from the record. The Court said, at page 207:

"In denying the plaintiff's motion for special bail and in entertaining the plea in abatement and rendering a judgment upon it, the Court admitted the defendant to appear, plead and defend contrary to the express provision of the statute. The judgment file shows a regular appearance of the parties to the action. The statute makes no distinction between an appearance for the pur-

pose of pleading in abatement and for the purpose of demurring or pleading to the merits. A plea in abatement is a defense."

According to the contention of the plaintiff-in-error, this practice of requiring special bail and the Connecticut Statutes requiring it, which go back to pre-revolutionary times, are unconstitutional and void as not constituting due process of law.

The validity of the order striking out the pretended pleas filed in this proceeding depends, therefore, entirely upon the correctness of the decision holding that appearance in an action of debt upon foreign attachment can be effected only by putting in special bail.

FOURTH POINT.

Appearance can be effected at common law both in actions of debt and in proceedings begun by foreign attachment only by putting in special bail.

Requiring appearance to be made by filing bail is neither new nor restricted to attachment proceedings.

Cunningham's Dictionary, printed in London in 1771 defines "Appearance" thus:

"Appearance in the law signifieth the defendant's filing common or special bail, when he is arrested on or served with any process out of the Courts at Westminster."

Requiring a defendant to appear by putting in special bail and compelling such appearance by seizure of his person or property was the usual and typical procedure of the common law. Civil arrest by *capias ad respon-*

dendum in actions of debt was settled procedure at common law from the reign of Edward III (25 Edward III, Stat. 5; Tidd's Prac. 8th Ed. pp. 100, 124; Bohun, *Institutio Legalis* 24, 25). Until the Statute of 12 Geo. I, C. 29, a defendant might be arrested and held for bail upon debt due for any sum, however trifling, but by that Statute as amended by 5 Geo. II, C. 27, 21 Geo. II, C. 3, it was provided that the defendant should be subject to arrest only when the amount claimed was £10 or more, as shown by affidavit to be filed in the action. The amount claimed was required to be endorsed on the writ of process, and the practice was to require special bail of the defendant in that amount unless it was reduced on application to the Court. (Tidd's Prac. 8th Ed., 163; Bohun *Institutio Legalis* 19, 27).

And see:

Anonymous (1698), 1 Salk. 100;
Collier v. Hague (1747), 2 Strange, 1270;
Anonymous (1798), 4 Har. & M. 159;
Hartman v. Purcell (1826), 1 Wend. 303;
Bradley v. Welch (1801), 15 Va. 284.

Wherever the defendant could be arrested, he could be held to bail and could appear only by giving special bail to the action (Tidd's Prac., 8th Ed., 240). The practice was to begin the action by arrest on *capias*. This continued to be the law of England until after the adoption of our Constitution. By 51 Geo. III, C. 124, Section 1, arrest was authorized only when the amount was £15 or more (Tidd's Prac., 8th Ed., 165-6). Before the statute of 12 Geo. I, C. 29, above referred to, it was discretionary with the court to discharge the defendant upon common bail or nominal bail, or to hold him to special bail, a discretion which was usually exercised in favor of the

special bail, hence the Statute limiting the right of arrest to actions in which £10 or more was the amount claimed.

The process of attachment was also resorted to at common law to compel appearance in any case where the action was not begun by *capias* and the defendant failed to appear. The action of *trespass vi et armis* might also be begun by attachment (Tidd's Prac. 8th Ed., 105-106). In all cases on failure of the defendant to appear, the plaintiff might proceed by *distringas*, or distress infinite, which was a process by which the sheriff was commanded to distrain the defendant's goods and chattels until the rents and issues of the distrained property equalled the debt and costs (Tidd's Prac. 8th Ed., 107). The process by attachment and *distringas* was availed of wherever the defendant avoided arrest (Tidd's Prac. 8th Ed., 112), and as a *capias* could not be had against a peer or a corporation, it was the only method of proceeding against either of them (Tidd's Prac. 8th Ed., 109; Bohun Institutio Legalis, 19).

3 Blackstone's Commentaries, 290, 291, referring to a *capias* says:

"Upon the return of the writ or within four days after, the defendant must appear according to the exigency of the writ. *This appearance is effected by putting in and justifying bail to the action;* which is commonly called putting in bail above."

Note to 3 Blackstone's Commentaries, page 290 (Sharswood Edition) says:

"In proceedings in the King's Bench by bill, whenever special bail is not necessary or has been dispensed with by the court, common bail (which are merely nominal) must be filed."

Highmore on Bail, published about 1783 at page 37, says:

"Within four days after the return of the writ, the defendant must appear, *by putting in bail above*, either the same as were joined in the bail-bond, or others."

1 Sellon's Practice, page 137, says:

"The defendant having put in bail to the sheriff, by entering into a bail bond, as before described, the next step to be taken is, his *appearance*, according to the condition of the bond, and the exigency of the writ; *which appearance is effected by putting in bail to the action*, commonly called *bail above*, in opposition to the bail given to the sheriff, usually termed *bail below*."

"The *bail below*, or to the sheriff, only undertake for defendant's *appearance on the return day of the writ*, (i. e.) for his putting in *special bail to the action*; for his *appearance can be effected by no other means*."

Bacon's abridgement, Volume 1, p. 538, citing the Complete Attorney, printed 1667, folio 45, says:

"The *ne recipiatur* is entered by the attorneys as officers of the Court, after which *no appearance is to be received till bail is filed with the judge*."

The Court of Common Pleas in the Fourth Year of the reign of William and Mary in the case of *Dashwood v. Folks*, 3 Levinz, *343, held that until the bail be put in the defendant is not in Court to plead anything, nor is the plaintiff obliged to declare against him. The full report of this case is as follows:

"Debt on Obligation. The Defendant pleads Privilege of the King's Bench, as Custos Brevium of that Court. The Plaintiff replies, that thereto he ought not to be admitted, because upon the Return of the *Capias* the Defendant had put in

Special Bail, viz. A. and B. Whereupon the Plaintiff demurred: And now it was argued, that by putting in of Special Bail he had submitted to the jurisdiction of the Court, as if he had imparled. But it was resolved by the whole Court, that the putting in of Bail is no submitting to the Jurisdiction of the Court, whether it be general or special Bail; for *until the Bail be put in, he is not in Court to plead anything*, nor is the Plaintiff obliged to declare against him; wherefore his Plea of Privilege was allowed."

In other words, the defendant could not appear even specially without putting in special bail.

In *Mayor & Commonalty v. Cooke, et al.* (1804), 1 Cranch, C. C. 160; 16 Fed. Cas. No. 9358:

"Motion by Mr. Simms and C. Lee, for defendants (Stephen Cooke and others), to appear on a chancery attachment, without giving security according to Act. Va. 1792, C. 78. (1) Because Dr. Cooke has so much real estate in town: (2) because the attachment is for taxes, and taxes can only be recovered by distress and sale.

"Appearance refused without security."

In *Voss v. Tucl* (1802), 1 Cranch, C. C. 72, 28 Fed. Cas. No. 17015:

"Trespass, for cutting scow to pieces. The plaintiff made affidavit that he had been informed and believed that the defendant with others had cut up and carried away his scow, and that it was worth One Hundred Dollars, and that he apprehended the defendant would leave the district upon the issuing of process against him, unless he should be held to bail.

"The Court refused to permit the defendant to appear without special bail."

In *Wager v. Lear* (1813), 2 Cranch, C. C. 92; 28 Fed. Cas. No. 17034:

"Mr. Jones, for defendant, offered an appearance without bail. * * * The Court ruled the defendant to give special bail."

A special form of attachment recognized by the common law was that under the Privilege or Custom of London. It is said by Drake on Attachments, Sections 1-8, that the attachment laws of the United States are founded on the Custom of London. It is certain that in at least eight of the thirteen original states, including Delaware, and in a number of other states, the attachment laws resemble the attachment by the Custom of London, although they are in many respects similar to the procedure of giving special bail to the action on arrest or attachment or *distringas*. Indeed, the very similar procedure in attachment in admiralty was said by Mr. Justice Johnson to be traceable to common law procedure rather than to the Custom of London. In *Manro v. Almeida* (1825), 10 Wheaton, 473, at page 490, Mr. Justice Johnson said:

"It is a mistake, to consider the use of this process in the admiralty as borrowed from, or in imitation of, the foreign attachment under the custom of London. Its origin is to be found in the remotest history, as well of the civil as the common law. In the simplicity of the remote ages of the civil law, the plaintiff himself arrested the defendant, and brought him before the Praetor. But as the sanctuary of his own habitation was not to be violated, if he came not abroad, a summons was attached to his door-posts citing him to appear and answer. Hence, our monition *vis et modis*. If he still proved recusant, after three times repeating this solemn notice, a decree issued to attach his goods; and thus, this process of the admiralty had a common origin with the com-

mon law mode of instituting a suit by summons and distress infinite. If the defendant obeyed, he could only appear upon giving bail; and thus again, the analogy was kept up with the appearance at common law, which was synonymous with filing special bail."

This practice in Admiralty was incorporated in the United States Supreme Court Rules in Admiralty of 1845, Rule 3. Under this rule, a defendant held to bail could only appear by special bail. See *Gardner v. Isaacson* (1848), 9 Fed. Cases 5230, which reviewed the history of the rule in Admiralty in England and America and upheld the practice as laid down by the United States Supreme Court Rule above referred to.

It is a somewhat startling proposition that a practice of almost universal application which was adopted by the United States Supreme Court in its Rules in Admiralty in 1845 is not now due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

In brief, the procedure under such Custom or Privilege of London was for the plaintiff to enter an action in the Mayor's Court of London and make an affidavit of his debt, which must be filed in the office of the Court and entered on the record, such action accompanied by the affidavit being the foundation of the process. The defendant could appear only by giving special bail. If the Sergeant at Mace made a return of the writ that the defendant could not be found within the liberties of the City, and the defendant being solemnly called at Court made default, the Court then ordered the Sergeant at Mace to attach moneys due the defendant or his property. Upon the return of the process of attachment, if such defendant at the same court and three courts from thence, that is to say, four several courts, did not appear, the plaintiff could then have his execu-

tion against the attached property. Before issuing execution on the attached property, however, the plaintiff was required to give two sureties to restore the sum so attached and had in execution of the defendant, if within a year and a day then next following, the defendant should come and disprove and avoid the debt (Bohun, *Privileges of London* (3rd. Ed.), 258, 286, 287). It is often said that attachment by the Custom of London lay only against moneys due from a resident of London to the defendant and hence was the forerunner of the modern principle of garnishment. It is true that moneys due to the defendant might be thus attached but the Sergeant at Mace could also take on attachment the goods and chattels of the defendant.

“By the Custom of London one may attach money or goods of the defendant either in the plaintiff's own hands or in the custody of other persons and that either in the Mayor's Court or in the Sheriff's Court.” (Bohun, *Privileges of London* (3rd Ed.), 253.)

See also: Bohun, pp. 3, 257, 261.

To the same effect is Lock on Attachment, pp. 2, 27; Pulling on the Laws of London, 2d Ed., p. 191.

As in actions in the King's Court, the defendant could appear in foreign attachment proceedings under the Custom of London only by giving special bail. In *Andrews v. Sir Robert Clerke* (1690), Carthew 25, 26, it was held:

“And it was agreed by all, that a foreign attachment in London, is to no other purpose, but to compel an appearance of the defendant in the action; for if he appear within a year and a day, and put in bail to the action, the garnishee is discharged, but without bail they will not accept an appearance.”

To the same effect is Bohun, page 260; Pulling on Laws of London, 2nd Ed., 189; Lock on Attachment.

In *Day v. Paupier*, 13 Adolph. & El., 802, decided by Lord Denman in 1853, it was held that in a case commenced by foreign attachment in the Lord Mayor's Court removed on certiorari to Queens Bench, the plaintiff is entitled to *procedendo*, and that the plaintiff is still entitled to special bail in actions begun by foreign attachment under the Custom of London notwithstanding the abolition of arrest by Statute 1 and 2 Vict., c. 110.

The procedure in the Delaware Courts under the Delaware Statutes already referred to, as we have seen (see pages 7-9, *ante*), was modeled exactly on the procedure under the Custom of London. The plaintiff was required to file an affidavit showing that the jurisdictional amount was due. On proof that the defendant was a non-resident and could not be summoned, the attachment issued. The defendant could appear only by giving special bail; the plaintiff could have his execution only by giving security for the repayment of the amount realized on execution, if the defendant should appear and defend within a year and a day. (See pages 27-28, *ante*).

Section 4100 of the Revised Code of Delaware provides:

"When a bail bond is given, the defendant cannot appear without giving special bail to the action, unless by order of Court, or with the plaintiff's consent."

Section 4137 of the Revised Code of Delaware of 1915 is in part as follows:

"Judgment shall be given for the plaintiff in the attachment the second term after issuing the

writ, unless the defendant shall enter special bail as aforesaid."

The writ of foreign attachment is of great antiquity in Delaware.

The Court in *Fowler v. Dickson and Tweeddale* (1909), 1 Boyce, 113-119, speaking of Foreign Attachment in Delaware, said:

"It had its origin in the Custom of London."

The Court of Errors and Appeals of Delaware in *Reybold v. Parker* (1883), 6 Houston 544, 553, speaking through Comegys, C. J., said:

"By a code of laws published at Hempstead, Long Island, on the 1st of March, 1664, by authority of the Duke of York (who at that time held a grant from his brother, King Charles II, of all the territory between the St. Croix River and the eastern side of the Delaware Bay (which was taken to include the settlements or colony on the western side also), the writ of attachment as well as summons was given to secure the appearance of a defendant to a suit, by the former of which his goods and chattels, lands and tenements were attached. (Duke of York's Laws, 10.) Afterwards, on the 20th of May, 1699, under the proprietary government of Penn, and whilst there was one Legislature for the province and these counties, a statute about attachment was passed."

Another attachment act was passed in 1770. This Act is substantially the Attachment Act of today. Section 3 thereof provided in part:

"But if the defendant or defendants in the attachment, or some sufficient person or persons for him, her or them, will, at any time before judgment be entered, put in special bail to the

plaintiff's action and to all other actions that his, her or their creditor or creditors shall enter against him, her or them, to the value of the lands and tenements, goods and chattels, rights and credits of the defendant so attached, and the costs of suit, then the garnishees and the lands, goods, chattels and effects of the defendant, shall thereupon be immediately discharged."

Part of Section 10 of said Act is:

"Judgment shall be given for the plaintiff in the attachment the (third (c)) court after issuing of the writ unless the defendant shall enter special bail as aforesaid."

Section 16 of the Act of 1770 provided for the issuance of a Writ of Attachment against non-residents.

On January 31, 1817, an Act entitled "A Supplement to an Act entitled 'An Act directing the manner of suing out attachments within this Government,'" was passed. (Revised Code, 1829, p. 52.) Section 3 thereof provided:

"Judgment shall be given for the plaintiff, in any original attachment, at the second term of the court after issuing the writ, unless the defendant, or some sufficient person for him or her, shall enter special bail, as is required and provided by the said act to which this is a supplement, anything in the tenth section of the said act to the contrary notwithstanding."

January 17, 1823, an Act entitled "An Additional Supplement to the act, entitled 'An Act directing the manner of suing out Attachments within this government,'" was passed. This Act, appearing at page 52 of the Code of 1829, is:

"A writ of attachment may issue out of any court of law in this State, against a non-resident,

upon the plaintiff or plaintiffs, or some other credible person for him, her or them, making oath or affirmation, that the defendant or defendants reside out of this State, and is or are justly indebted to him, her or them, in the sum of fifty dollars, and upwards; which oath or affirmation shall be administered by the Clerk of the Supreme Court or Prothonotary of the Court of Common Pleas, and filed of record in the said cause: and the said writ of attachment shall be proceeded in as is directed and required by the third section of the act to which this is an additional supplement, and the act supplementary thereto; and so much of the act to which this is an additional supplement, as requires the person or persons requesting a writ of attachment, or some other credible person for him, her or them, to make oath or affirmation, that the defendant avoids coming into this government, lest he or she be taken to answer his or her just debts, is hereby repealed, made null and void."

Woolley on Delaware Practice, a work of authority, at Section 1258, says:

"The object of the process of domestic attachment being to compel an appearance, the property of the defendant is discharged when that object is attained, but appearance in proceedings begun by process of domestic and foreign attachment means something more than the defendant coming into court in person or by his attorney, to answer the plea of the plaintiff. In proceedings begun by domestic attachment, security is a prerequisite to appearance."

Woolley on Delaware Practice, Section 1291, says:

"Foreign attachment being a process by which the appearance of a non-resident defendant is enforced, the function of the process is performed when such non-resident defendant enters his ap-

pearance. As a judgment upon an action instituted by foreign attachment against a non-resident would be of doubtful value by reason of such non-residence and inability of the court to execute the judgment against the property of a non-resident beyond that which may be attached, the statute provides that before appearance shall be entered in actions begun against persons and before the property attached in actions begun against both persons and corporations shall be discharged, the defendant shall enter security, or special bail. With respect to appearance and security, the statutes relating to actions by foreign attachment against persons and against corporations, make different provisions."

Woolley on Delaware Practice, Section 1292, says:

"After an attachment has been laid under process of foreign attachment against an individual, in order for the individual to defend the suit, he is required to appear, and in order to appear he is required to give security to the action."

The following expressions of eminent jurists of Delaware show that no thought has ever before been entertained by Bench or Bar that the defendant could appear or defend without first giving Special Bail.

In *Wells v. Shreve's Admr.* (1861), 2 Houst. 329, being an action commenced by writ of foreign attachment, the Court of Errors and Appeals, pp. 369, 370, said:

"And yet, all that was said by counsel on that point, was strictly correct, so long as the suit which is instituted in this method retains its original character and nature of an *ex parte* proceeding *in rem* to a judgment of condemnation against the property bound by the foreign attachment; for whilst it continues such, there is no ap-

*pearance of the defendant, no declaration filed, no defence whatever pleaded, no issue joined and no trial had, and, of course, in such a case, no question of limitation can arise, and the statute can have no application at all to it. But when the defendant in such a writ voluntarily appears in court within the time prescribed by law and gives special bail in the action and the attachment is dissolved, it is *functus officio*, it has performed its office and is at an end for all the purposes of the case in which it was issued, for it then becomes an action *in personam* and assumes all the qualities and characteristics of such an action and is to be prosecuted and conducted in all respects the same as if the defendant had been served with original process in it."*

In *Frankel v. Satterfield* (1890), 9 Houston, 201, 209, the Court said:

"In this State the institution of a suit by foreign attachment process is a statutory proceeding, which must be pursued conformably with the statutory provisions authorizing it. * * * Here it is, in its original character, in the nature of an *ex parte* proceeding *in rem* to judgment of condemnation against the property bound by the foreign attachment; *for, while it continues such, there is no appearance of the defendant, no defence whatever pleaded, no issue joined, and no trial had.* If the defendant in such a writ voluntarily appears in court, and gives security in the form, and within the time, prescribed by law, the attachment is dissolved, is *functus officio*, has performed its office, and is at an end for all the purposes of the case in which it was issued; for the proceeding then becomes an action *in personam*, and assumes all the qualities and characteristics of such an action, and is to be prosecuted and conducted in all respects the same as if the defendant had been served with original process in it."

In *National Bank of W. & B. v. Furtick* (1895) 2 *Marvel*, 35, 51, the Court of Errors and Appeals said:

"In *Wells v. Stevens' Admrs.*, 2 *Houst.*, 370 *Houston, J.*, said: 'In this State, a suit by foreign attachment is in its original character, in the nature of an *ex parte* proceeding *in rem* to judgment of condemnation against the property bound by the foreign attachment, for, while it continues such, there is no appearance of the defendant, no defense whatever pleaded, no issue joined and no trial had.' This was followed in *Frankel v. Satterfield*, 9 *Houst.*, 201 where the Court, per *Grubb, J.*, said: 'Under the statutory provisions, it is plain that if no property has been attached by writ, there can be no attachment to dissolve, no security given, no appearance by the defendant, no action *in personam* and, consequently from want of jurisdiction, no judgment *in personam*. Nor can there be a judgment *in rem* for like reasons'."

Although the immediate point may not have been presented to the Delaware Courts in the foregoing cases, yet the expressions by the Court pertaining thereto were not obiter and are authoritative expositions of the law.

It is clear that under the Delaware Statute no appearance may be effected in foreign attachment proceedings save by putting in special bail. It is also true that under this Statute the judgment against the defendant can only be a judgment by default for want of appearance, that is, by putting in special bail, for if appearance be made "the case proceeds to pleading, issue, trial, judgment and execution, like cases begun by process of summons." (*Woolley Delaware Practice*, Sec. 1292, and cases last cited.)

Sergeant on Foreign Attachment, Page 20, says:

"This judgment against the defendant can only be a judgment by default, for want of appearance by him, that is by entering special bail."

Permitting appearance in attachment cases only by special appearance was not an innovation of the Delaware Statutes. It was held in *Andrews v. Clerke*, supra, decided about the year 1690, that a defendant could not put in an appearance in a foreign attachment in London without putting in bail to the action.

To the like effect is, Bacons Abridgement, Volume 3, page 51, under the caption "Customs of London, H. 1" as is also Comyn's Digest under the heading "Attachment E."

Sergeant on Foreign Attachment, Page 5 says:

"A foreign attachment is only a process to compel an appearance; and is dissolved by the defendant's entering such appearance, *by putting in bail to the suit.*"

Sergeant on Foreign Attachment, Page 134 says:

"For the object of the foreign attachment, in the first instance, is to compel an appearance by the defendant, and when such appearance is effected *by special bail being put in* * * * the object is attained; and the suit proceeds as in ordinary cases."

Sergeant on Foreign Attachment, Page 140 says:

"For in a case of the foreign attachment, a common appearance cannot be ordered; the defendant, being absent, cannot enter a common appearance, or give a warrant of attorney for that purpose."

4 Cyc., 816 says:

"Where special bail was required an attachment was regarded as an original process to enforce appearance and defendant in attachment could not plead until he had filed such bail."

Drake on Attachment, Section 312 says:

"In some States, as under the Custom of London, the defendant is not allowed to plead to the action until he has given such a bond."

In *Callender & Co. v. Duncan* (1831), 2 Bailey (S. C.) 454, the defendant appeared and pleaded to the action without putting in special bail, to which the plaintiff made no objection. The Court said:

"The proceeding in attachment is in the first instance entirely a proceeding *in rem*. The defendant may, if he choose, put in special bail and dissolve the attachment, and thus make it exclusively a proceeding *in personam*. If the defendant proposes to appear and plead without putting in special bail, the plaintiff may object to his doing so, and upon the objection being made, it would be irresistible. *Acock v. Linn & Lansdown*, Harp. 369, *Fife & Co. v. Clarke*, 3 M'C. 347."

In *Vann v. Frederick* (1831), 2 Bailey (S. C.) 303, it was held that the wife of the absent defendant in attachment cannot appear and plead to the declaration. The Court said:

"The first question made in the case is, in reality, whether the absent defendant can appear and plead without putting in special bail. Apart from the showing of the husband's death, the wife could only appear as attorney to represent and defend him. This question has been fully settled by the cases of *Acock v. Lynn & Lansdown*, State Rep. 368, and *Fife & Co. v. Clarke*, 3 M'C. 347,

in which it is held that he cannot appear. The condition of putting in special bail before the party shall be allowed to plead, is not prescribed by the express terms of the attachment act, but was established by practice, and the analogy of law."

In *Wigfall v. Byne* (1845), 29 S. C. Law (1 Rich.), 412, the Court said:

"The property is released by the substitution of his person to the jurisdiction of the court by entering special bail. Until that is done, the proceeding continues to be *in rem*, which, as a common appearance and defense does not vacate, neither does a confession of judgment have that effect."

To the same effect is *Williams v. Haselden* (1856) 38 S. C. Law (10 Rich.) 55.

In *Alexander v. Taylor* (1866), 62 N. C. 36, it was held,—the debtor in an attachment suit in equity has no *status* in Court until he has appeared and replevied, in accordance with the 25th Section of Revised Code, Chapter 7. The Court said:

"A joint demurrer is filed by Moses B. Taylor, John J. Blackwood and James M. Sanders. The statute, sec. 25, authorizes the debtor at any time before final decree to replevy, by executing a bond, &c., and 'thereupon he shall be permitted to plead, answer or demur to the bill,' &c., Taylor has not executed a bond, and therefore has no *status* in court, * * *."

In *Watson v. Noblett* (1900), 47 Atl. 438, 65 N. J. Law 506, the Court said:

"The attachment against absconding or absent debtors given by the act of March 8th, 1798, * * * still subsisting in revised form, * * * is a different writ adapted from local procedure peculiar

to the City of London. Originally our act authorizing it limited the right of the defendant to appear by requiring from him a bond, on the approval of which the writ was set aside."

A reference to the case of *Garrett v. Tinnen* (1843), 8 Miss. (7 How.) 465, says:

"In attachment for a debt not due, the defendant in attachment has no right to plead until he has given bond for the payment of the debt."

To the same effect is *Rowley & Gauze v. Cummings*, (1843), 9 Miss. 340.

The Court of Appeals of Maryland in the case of *Campbell v. Morris* (1797), 3 Harris & McH. 535, reached the same conclusion and said:

"The Court are of opinion that upon the return of an attachment, the defendant cannot appear without bail, if cause of bail appears on the proceeding, and cause of bail must appear, if the Act of Assembly has been pursued, because there must be proof of the debt before the attachment can issue.

"The attachment is to compel the appearance of the defendant.

"When the defendant comes in on the return of the attachment to appear, he is in the same situation he would have been in if taken on a *capias ad respondendum*, and cannot appear without bail. * * *

"Before the appearance of the defendant, which cannot be but upon giving bail, which will be a dissolution of the attachment, no evidence is admissible which relates to the merits of the dispute between the parties."

The same procedure on foreign attachment was adopted in Indiana (see *Abbott v. Warriner* (1845), 7

Blackf. 573); in Tennessee (*Boyd v. Buckingham & Co.* (1850, 10 Humph. 434, 437); in Ohio (see *Voorhees v. Bank* (1836), 10 Peters 449, citing, at p. 453, 1 Chase's Statutes, p. 462), in Virginia (*Tiernans v. Schley* (1830), 2 Leigh 25, 28), and in Pennsylvania (*McClenachan v. McCarty* (1788), 1 Dallas, 375).

McClenachan v. McCarty (1788), 1 Dallas, 375, is a most instructive case on foreign attachment. In this case judgment was entered at the third term; a writ of inquiry being afterwards executed, a motion was made on behalf of the defendant to quash the return because the sheriff at the inquest had refused to hear his evidence. The Court by Shippen, President, (whose knowledge of the law of foreign attachment was said by later judges of Pennsylvania to have been unequalled) said:

"This is a motion to set aside the inquisition of a jury of inquiry in a foreign attachment, on the ground of the defendant's evidence being refused to be heard before the sheriff and inquest, on the execution of the writ of inquiry.

"On the part of the plaintiffs, two points have been made and argued:

"1st. That on the execution of writs of inquiry generally, no evidence on the part of the defendant ought to be heard, as by suffering judgment to go by default, he had admitted the plaintiff's cause of action; and that, therefore, evidence on the part of the plaintiffs only should be heard.

"2d. That, although it were admitted, that, generally, on executing writs of inquiry, after an interlocutory judgment, such evidence might be heard; yet, in those cases where writs of inquiry are executed to ascertain the plaintiff's demand, after judgments on foreign attachments, no such evidence should be admitted; because the foreign

attachment issues only to compel an appearance, and the defendant has it in his power, even after the return of the inquisition, *by entering special bail*, to try the cause in the usual manner, before a court and jury.

"As to the first point, the law seems settled, that, after a judgment by default, the defendant has a right of offer his evidence to the jury of inquiry, to combat the plaintiff's proofs; and that where the sheriff refuses to hear the evidence on both sides, the court will direct a new writ of inquiry.

"As to the second point, it will be necessary to consider the law of attachments of 1705, and the practice under it, together with the reasons and extent of that practice.

"The legislature in framing this act, certainly took for their model the custom of London, concerning foreign attachments; the principles of the law and mode of proceeding are in many respects conformable to that custom; and the difference appears to be less in the act itself, than in the practice under it. In London, the proceedings is by plaint against the defendant, supported by the oath of the plaintiff; on this is founded the attachment and proceedings against the garnishee; but no further proceeding is had against the defendant, till he enters special bail, *and then a declaration is filed* and a trial had in the usual way. The practice under our act is first to obtain judgment against the defendant, then to file a declaration against him according to the nature of the demand; if in debt, the judgment stands for the sum declared for, without even an oath to support it; if in case, a writ of inquiry issues, for a jury to ascertain the demand, and then the *scire facias* issues against the garnishee. No actual notice is given to the defendant of the execution of the writ of inquiry; his attendance is never expected, and is, in most cases, impossible. It seems to be a mode adopted, not for a trial of the merits, but

only to conform to the nature of an action on the case, which requires a jury of inquiry to ascertain the sum for which the execution is to issue; and it may be considered as a proceeding to inform the conscience of the court, in the room of the supposed oath in the action of debt. In its nature it appears to be an *ex parte* proceeding, and not within the reason of the rules in executing writs of inquiry on judgments by default; where the defendant has regular notice, and has no other opportunity of making a defence.

"The attachment law, and all proceedings under it, suppose the defendant to be an absent person, and he has, in truth, no day in court, *until he enters special bail*, and thereby dissolves the attachment; or comes in afterwards, when the money is recovered from the garnishee, to disprove the debt, which is done by a *scire facias ad disprobandum debitum*; in either of which cases, he puts the plaintiff upon the legal proof of his demand, and is admitted to make a full defence. The right of making that defence before the jury of inquiry, has no foundation either in the act or the practice under it. The law supposes, from his absence, that he is then incapable of making a defence; and for that reason, has afforded him ample time and opportunity afterwards to do it; nor does it accord with legal ideas, that he should have this opportunity of trying his cause, and also another afterwards upon entering special bail.

"It has been said, that notice of executing these writs of inquiry has been usually set up in the prothonotary's and sheriff's offices; and that this notice would be in vain, if the party might not appear and make his defence. This practice of putting up notices, must have been introduced by the gentlemen of the law *ex majore cautela*. If it were a new case, we should perhaps think it nugatory; as a person abroad cannot be supposed to take notice of a paper put up in the office, which he could never see. However, as it is the practice, it is proper it should be continued; and

it may, at least, serve the purpose of giving the garnishee, or the attorney in fact of the defendant, an opportunity of knowing, and apprising his constituent, of the nature of the plaintiff's demand, that he may be prepared to defend himself against it.

"Upon the whole, we are of opinion, that the refusing to admit the defendant in the attachment to produce his evidence before the jury of inquiry, is not a sufficient reason for setting aside the inquisition."

The remedy by attachment must be pursued in conformity with the terms of the law conferring it.

Drake on Attachment, Section 4 a, says:

"Nothing more distinctly characterizes the whole system of remedy by attachment, than that it is—except in some States where it is authorized in chancery—a special remedy at law, belonging exclusively to a court of law, *and to be resorted to and pursued in conformity with the terms of the law conferring it.*"

The Court of Errors and Appeals in *Reynolds v. Howell* (1893), 1 Marvel, 52, at 59-60, said:

"The remedy by attachment arises entirely under the statute of our State, and hence all proceedings in relation thereto must conform to, and be consistent with, the provisions of such statute. It furnishes a summary remedy, while in most, if not all, the States of this country, the proceeding by attachment is governed and controlled by statutes which differ more or less in very many material respects; hence we find a great variety of conflicts of decisions upon the subject of attachment proceedings, by reason of the different provisions in their statutes, apart from some general provisions governing the law of attachment, which

prevail generally, alike in this country and in England."

The Court in *Penna. Steel Co. v. N. J. S. R. R. Co.* (1874), 4 Houston, 572, 578, said:

"At common law there was no such proceeding as this, and in this State the whole matter of such a proceeding is regulated by statute."

Under the Statute judgment may be obtained, while the proceeding remains an attachment proceeding, only by default and this default judgment must, under the Statute and decisions, be had at the second term. If therefore, judgment be not obtained for want of appearance at the second term no judgment would be authorized by the attachment Statutes and the property would undoubtedly be automatically discharged from the attachment and the attachment dissolved on the adjournment of the second term of the Court after attachment. The attachment proceeding after appearance without bail as attempted by the defendant would either continue an attachment proceeding with the result stated or be converted into a proceeding *in personam*. But in the latter event the property would be also discharged for the Court of Errors and Appeals in *Reynolds v. Howell* (1893), 1 Marvel, 52, 60, said:

"The object in foreign attachment is to compel an appearance, and when that object is obtained, the property attached is discharged; and though the seizure of the officer holds the property, and may be said to place the same in *custodia legis*, yet such seizure does not constitute a lien such as is made by execution process founded on a judgment, which is absolute,—dependent on no contingency or condition. The lien by attachment process is wholly dependent upon the subsequent recovery of a judgment on the attachment process

*in accordance with the provisions of the statute, and upon execution sued out on such judgment the same may be levied upon property so attached, and the lien of the execution goes back, and holds the property as of the date of the attachment. In other words, the attachment holds the property subject to be taken in execution upon a judgment subsequently recovered in the attachment proceedings, and not till then becomes a fixed and permanent lien. If no judgment can be obtained, by reason of any matter which defeats or prevents the legal recovery, then such conditional lien is at once dissolved, but no fixed lien can be had until judgment and execution. * * * The attachment proceedings must be perfected by judgment; otherwise the lien existing by attachment of property or summoning garnishees is dissolved."*

In brief, the writ of attachment will hold the property only until the end of the second term. The property if longer held must be held by a judgment.

It would seem to be an inevitable conclusion that if the defendant were permitted to appear without giving special bail further proceedings by the plaintiffs would be wholly nugatory. This is precisely what happened in *Tiernans v. Schley* (Va. 1830), 2 Leigh 25, and what will happen in the case at bar if the decision of the Delaware Court is reversed.

It is said by the plaintiff-in-error that the statute requiring appearance to be made only by the entry of special bail is a harsh law and imposes a hardship on defendants, but with this, courts, it is respectfully submitted, have nothing to do.

In *St. Mary's Petroleum Company v. West Virginia* (1906), 203 U. S. 183, 192, the Supreme Court said:

*"The objections going to the expediency or the hardships and injustice of the act, * * * are matters with which we have nothing to do on this Writ of Error."*

In *Carpentier v. Ins. Co.* (1810), 2 Binn. 264, 266, Tilghman, C. J., said:

"When the meaning of a law is doubtful, the argument from inconvenience has great weight; but when the meaning is clear, it is the duty of judges to construe it according to its intent, without regard to consequences. This is the duty of judges in all countries; but particularly in this Country, where the legislature is convened at least once in every year, so that there are frequent opportunities of removing inconveniences."

In *Bushel v. Insurance Co.* (1827), 15 Ser. & Rawle, 173, 182, it was said:

"It is beyond the powers of courts of justice to grant relief, unless such relief be authorized by the laws of the land. The legislature is now in session, and if the evil calls so loudly for redress, let the legislature give it, but not us,—whose province it is to decide on the interpretation of laws,—make them as we go along, put them on the judicial anvil, and with the judicial hammer give them a different shape, and fashion them according to our own notions of right and wrong."

36 Cyc. 1103 defines judicial authority and duty in the construction of Statutes as follows:

"The Courts, however, must confine themselves to the construction of the law as it is, and not attempt * * * to supply defective legislation, or otherwise amend or change the law under the guise of construction. The wisdom or want of wisdom displayed in the act is not a question for the courts, nor are the motives of the legislature in including or omitting certain provisions."

The Circuit Court of Appeals in *St. Louis & S. F. R. Co. v. Delk* (1908), 158 Fed. 931, 934, in construing an Act, said:

"It is bound to consider the conditions to which the statute applies. And if it is seen that in its practical application doubts and difficulties arise, it becomes its duty to scrutinize the statute, and resolve whether, by a sensible construction of it, those difficulties may be avoided. * * *

"By 'doubts and difficulties' we, of course, do not mean those which are engendered by the predilection of the court or its own notions of what the law ought to be, but doubts and difficulties which are inherent in the nature of the problem to be solved. These propositions we presume no one will deny, and it may be thought a work of supererogation to state them. But they are not always remembered by those who make unthinking haste to reach what they believe to be a desideratum. * * *

"For, if we look too intently upon some ultimate good we would wish to accomplish, we are very liable to distort the law or make out of it some other enactment than that which the Legislature has in fact passed."

In *Ladew v. Tennessee Copper Co.* (1910), 179 Fed. 245, 252, the Court said:

"The construction and interpretation of statutes cannot extend to amendment or legislation. *U. S. v. Fisk*, 3 Wall. 445, 448, 18 L. Ed. 243; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 495, 26 Sup. Ct. 133, 50 L. Ed. 281. Nor can consideration of apparent hardship justify a strained construction of the law as written. *Jos. Schlitz Brewing Co. v. U. S.*, 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. 'The remedy,' if any be required, 'is in Congress.' *Ex parte Girard*, 3 Wall. Jr. 263, 10 Fed. Cas. 436, Fed. Cas. No. 5,457."

In *Railroad Commission v. Grand Trunk Western R. Co.* (1912), 179 Ind. 255; 100 N. E. 852, 855, the Court said:

"The courts cannot venture upon the dangerous path of judicial legislation to supply omissions, or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers."

St. Louis, etc., Ry. Co. v. Taylor (1908), 210 U. S. 281, 295, said:

"It is urged that this is a harsh construction. To this we reply that, if it be the true construction, *its harshness is no concern of the courts.* They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. *It would be better, it was once said by Lord Eldon, to look Hardship in the face rather than to break down the rules of law.*"

Again it must be remembered that the alleged hardship is not a real hardship for the Court below had ample power under Section 4123 of the Revised Code to consider

fully the plaintiffs' causes of action and the value of the property attached under all the circumstances of the case if application had been made to the Court to fix bail. (*Vienne v. McCarty*, 1 Dallas, 154, and cases there cited.) But the plaintiff ^{in error} elected not to make this application but, instead, to attempt to appear without bail. In the one application the allegation could be investigated. In the other it is wholly irrelevant.

The foregoing authorities disclose, it is respectfully submitted, not only that appearance in foreign attachment can be effected only by putting in special bail, but also that appearance in this manner has the sanction of settled usage both in England and in this country since early Colonial days. As we have seen, it was the established practise in at least eight of the thirteen original states, and it was also adopted in a number of other states, including Indiana, Ohio and Tennessee. It was adopted into the early admiralty practice in the United States Courts and was recognized and adopted in Federal Procedure by Federal Statutes, which are now in force and some of which have been in force since the organization of the Government (see page 55, *post*).

FIFTH POINT.

A state statute requiring appearance to be made by putting in special bail does not violate the Due Process of Law Clause of the 14th Amendment to the Federal Constitution.

The "due process of law" clause occurs twice in the Federal Constitution; once in the Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property without due process of law;"

and again in the Fourteenth Amendment,

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

The one is a limitation imposed upon the powers of the Federal Government; the other a limitation imposed upon the powers of the States. But the meaning of "due process" is the same in each.

In *Hurtado v. California* (1883), 110 U. S. 516, after a discussion of the meaning of the phrase in the Fifth Amendment, the Court said:

"The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense, and with no greater extent."

The framers of the Constitution were engaged in setting up a new form of government and were preserving to each citizen the privileges of its Courts, which, by common consent, had been agreed upon as the efficient means of protecting citizens against injustice and had been found fairly adapted to enabling a citizen to protect himself from partiality, unfairness or injustice in the Courts. They were not attempting to institute new processes in the Courts, or to condemn those processes, which had been found by experience through a long course of time, to be necessary to the administration of substantial justice. At that time the existence in every jurisdiction of proceedings in attachment, furnished proof that such proceedings had been found to

accomplish this purpose. *Capias* proceedings at that time existed everywhere. It cannot be conceived that when the framers of the Constitution used this phrase, they intended to grant to the people of the United States in the Federal Courts, immunity from the processes of the law used practically throughout the Union for securing, obtaining, protecting and preserving the rights and property of citizens.

As the meaning of the due process clauses is the same in both the Fifth and Fourteenth Amendments except in their application respectively to Federal and State powers, cases testing the validity of Federal or territorial acts and State acts are equally authoritative on the question at Bar.

(a) *The process of law known as foreign attachment is not prohibited by the due process clause.*

In *Central Loan & Trust Co. v. Campbell* (1899), 173 U. S. 84, which was an action begun by attachment, on affidavit, against a non-resident defendant, the Court said, by Mr. Justice White, at p. 97:

"It is insisted that 'under the organic act of the Territory, the court could not acquire jurisdiction of the person of the defendant by constructive service by foreign attachment without its consent.'

"The section of the organic act referred to requires that all civil actions shall be brought in the county where a defendant resides or can be found. In a proceeding by attachment of property, which is in the nature of an action *in rem*, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached. *It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the*

property of non-residents in the place in the territory where the property of such non-resident is found.

"The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the Territory, it is said, in case of an attachment, for the cause stated, against a resident of the Territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a non-resident. This, it is argued, is a discrimination against a non-resident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied that for the purposes of the remedy by attachment, the legislative authority of a State or Territory may classify residents in one class and non-residents in another, but it is insisted that where non-residents 'are not capable of separate identification from residents by any facts or circumstances other than that they are non-residents—that is, when the fact of non-residence is their only distinguishing feature—the laws of a State or Territory cannot treat them to their prejudice upon that fact as a basis of classification.'

"When the exception, thus stated, is put in juxtaposition with the concession that there is such a difference between the residents of a State or Territory and non-residents, as to justify their being placed into distinct classes for the process of attachment, it becomes at once clear that the exception to the rule, which the argument attempts to make, is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question. The argument

in substance is that where a bond is required as a prerequisite to the issue of an attachment against a resident, an unlawful discrimination is produced by permitting process of attachment against a non-resident without giving a like bond. But the difference between exacting a bond in the one case and not in the other is nothing like as great as that which arises from allowing processes of attachment against a non-resident and not permitting such process against a resident in any case. That the distinction between a resident and a non-resident is so broad as to authorize a classification in accordance with the suggestion just made is conceded, and, if it were not, is obvious. The reasoning then is, that, although the difference between the two classes is adequate to support the allowance of the remedy in one case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is exacted in the other. The power, however, to grant in the one and deny in the other of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding, on the one hand, the power to classify residents and non-residents, for the purpose of the writ of attachment, and then from this concession, to argue that the power does not exist, unless there be something in the cause of action, for which the attachment is allowed to be issued, which justifies the classification. As, however, the classification depends upon residence and non-residence, and not upon the cause of action, the attempted distinction is without merit."

The case of *Pennoyer v. Neff* (1877), 95 U. S. 714, has been said to be a land-mark in the Law of Attach-

ments. The Supreme Court, among other things, at page 722, said:

"The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. *One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.* As a consequence, every State has the power * * * to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred."

See also:

Herbert v. Bicknell (1914), 233 U. S. 70, commented on more at length at p. 81, *post*, of this brief.

Under its own decisions the United States Supreme Court cannot be asked to declare the Foreign Attachment Act of Delaware unconstitutional as a whole. The sole question therefore is,—whether the section of the Statute requiring appearance to be made by putting in special bail is constitutional.

(b) *A process of law is due process within the meaning of Constitutional Limitations if it can show the sanction of settled usage both in this country and in England.*

It was shown (pp. 21-49, *ante*), at much length, that requiring appearance to be made by putting in special

bail is a process of law established at common law as well as in attachment proceedings both in this Country and in England. The authorities there cited will not be repeated here. It suffices to say that at common law appearance could only be entered by putting in special bail in action to recover ten pounds or more (page 22, *ante*), and in actions of debt begun by foreign attachment, and that this was the established procedure in at least eight of the original states and in a number of other states which later adopted it.

But in addition to being a settled usage and mode of proceeding existing in the common and Statute Law of England, the American Colonies and States, it is a mode of proceeding known to and prescribed by the Statutes of the United States since the foundation of its government.

U. S. Revised Statutes, Sections 942 to 947, inclusive:

U. S. Statutes Volume 1, p. 79;

U. S. Statutes Volume 5, p. 498;

U. S. Statutes Volume 5, p. 678.

The first of these statutes is a recognition of the requirement of special bail as regular procedure in the state courts. It provides in substance that in suits for recovery of duties or pecuniary penalties in states where imprisonment for debt is allowed, the defendant may be held to special bail. The second and third of these statutes provide that on removal from state to United States courts, the defendant shall be required to enter special bail when he is required to put in special bail by state law, and the last provides that the defendant shall not be held to special bail in civil suits in the District of Columbia unless the claim exceeds \$50, thus reenacting the Statute of 12 Geo. I, C. 29 (see p. 22, *ante*).

The same principle is carried over in the proceeding of distress for rent which is a proceeding by which the property of the tenant is seized and sold by the landlord unless the tenant replevy it. To replevy, the tenant must give bond in double the amount of goods seized. This ancient common law procedure which is still in force in Delaware and other states is then substantially another instance of appearing only by special bail. It may be suggested that the due process clause does not apply to distress for rent as it is not a judicial procedure. But the Supreme Court has expressly stated and in numerous instances held that the limitation of the due process clause is not restricted to judicial proceedings.

McMillen v. Anderson (1877), 95 U. S. 37;
Kelly v. Pittsburg (1881), 104 U. S. 78;
Murray v. Hoboken Land & Improvement Co. ~~(1885)~~, 18 How. 272.
 (1885)

Without more it is submitted it has been shown herein that *requiring appearance by special bail has the sanction of settled usage at common law and in attachment proceedings both in England and in this Country.* In fact, as said by Cunningham's Dictionary, "Appearance signified filing common or special bail."

It follows from the foregoing that the requirement that a defendant put in special bail in order to enter his appearance, legal procedure which has the sanction of settled usage at common law and in attachment proceedings, both in England and in this country, is due process of law within the meaning of constitutional limitations.

In *Light v. Canadian County Bank* (1894), 2 Okla. 543, 37 Pac. 1075, an order for the arrest of the defend-

ant below was issued, and the defendant arrested. Thereupon the defendant moved to discharge the order of arrest, which was denied.

Among the errors assigned by the plaintiff-in-error was the following:

"The court erred in rendering judgment that execution be issued to the sheriff to arrest the defendant and imprison him until said debt and costs should be fully paid, or defendant discharged."

The Court said (2 Okla. 548; 37 Pac. 1076):

"It is further claimed by plaintiff-in-error under his fourth assignment of error that the provisions of the statute (chapter 66, art. 9, Secs. 148-154, Code Civ. Proc.) are in contravention of the constitution and laws of the United States, and that the order of the probate judge to the sheriff of Canadian County to arrest the plaintiff-in-error, and hold him to bail in double the sum of \$355.75, as stated in the affidavit for arrest to be due, was in violation of article 5 of amendments to the constitution of the United States, providing that 'no person shall be deprived of life, liberty or property without due process of law;' that by the arrest he was deprived of his liberty without due process of law; that the arrest and imprisonment of a citizen on an affidavit, to be kept under arrest or bail until discharged according to law, is not in any sense 'due process of law,' but that due process of law implies jurisdiction and trial; and further, that article 7 of amendments to the constitution of the United States provides that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This is a suit at common law, and the proceedings in arrest in this case are in violation of the constitution.

Upon this contention it is to be said that 'due process of law' is the law in its usual course of administration through courts of justice. 2 Story, Const. Secs. 1941-1952; *Murray's Lessee v. Improvement Co.*, 18 How. 272; *Wynehamer v. People*, 13 N. Y., 378. It means in each particular case such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the preservation of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. *Stuart v. Palmer*, 74 N. Y. 191; *Cooley*, Const. Lim. 355. It is probably wiser to leave the meaning of 'due Process of law' to be evolved 'by the gradual process of judicial inclusion and exclusion as the case presented for decision shall require, with the reasoning on which such decision may be founded.' Mr. Justice Miller, of the United States supreme court, in *Davidson v. Board*, 17 Ala. Law J. 223. 'The peculiar necessities which call for the action of an officer, and whether the power was exercised in the same manner prior to the adoption of the constitution without being regarded as a violation of the principles of Magna Charta, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit—the case being one in which the end sought to be obtained is lawful,—the statute cannot be said to deprive a party of the benefits of due process of law.' Judge Cooley, in *Ex parte Ah Fook*, 49 Cal. 406. It does not necessarily require a trial by jury except in regular common-law proceedings. *Walker v. Sauvinet*, 92 U. S. 90; *Roach v. Spann*, 3 Stew. (Ala) 108; *In re Curry*, 1 N. Y. Civ. Proc. R. 319; *Church v. Kelsey*, 7 Sup. Ct. 897; *Donshue v. County of Will*, 100 Ill. 94; *Hilton v. Merritt*, 110 U. S. 97, 3 Sup. Ct. 548; *People v. Hays*, 37 Barb. 440; *The J. W. French*, 13 Fed. 924; *Ris-*

see v. Hoyt, 53 Mich. 185, 18 N. W. 611. So of article 7 of amendments to the constitution. The constitutional guaranty in the various states, that the right to trial by jury shall be preserved and shall remain inviolate, refers to the right as it existed at the time of the adoption of the constitution. That amendment provides that 'in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,' etc. That declaration provides that the right of trial by jury shall be preserved; that is, kept just as it was at the time of the adoption of article 7 of amendments. This provision does not extend, but preserves, the right of trial by jury. Cases to which it was not then applicable are still exempt from its application. The provision is also made in such terms as to justify the view that it was intended to apply solely to the ascertainment of the amount or value in controversy, and for which judgment should be entered up, and not to the method of enforcing the judgment of the court, and to the means within the power of the court to compel compliance with its orders. Such methods of procedure for enforcing compliance with the orders of the court are within the power of the legislature of the various states, and the proceeding for arrest and bail herein referred to is among these means. 'Due process of law' carries with it, therefore, the right of trial by jury, when trial by jury has been the usual course of administration in the particular class of cases through courts of justice to which the one in question belongs. What was, at the time of the adoption of the constitution of the United States, the usual course of administration through courts of justice, was grafted into that instrument under the name of 'due process of law.' That term carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through courts of justice at the time the constitution was adopted. It does not give the right of trial by

jury in cases in which it did not exist at that time. It does not give it in the large fields of equitable and admiralty jurisdiction."

The constitutionality of proceedings by distress warrant was considered by the Supreme Court of Appeals of West Virginia in the case of *Anderson v. Henry* (1898), 31 S. E. 998; 45 W. Va. 319. The Court there said:

"It is urged that this proceeding is in violation of amendment 14 of the Constitution of the United States, guarantying due process of law. The remedy of distress existed before the discovery of America, and was brought to Virginia by Capt. Smith, and has never ceased; and it seems useless to argue to show that a remedy so long antedating said amendment, a remedy for and against all alike, is not destroyed by it. That amendment is not the 'scarecrow' it is often represented to be; it does not overthrow state laws, rights and remedies, to the extent and purposes for which it is often cited. *It respects the common law, the statute law, the remedies and procedure existing in the state at its adoption.* Cooley, Const. Lim. 434, note 1. It came to preserve, not to destroy, existing rights. Just as well say that the tax bill seizing a horse for taxes is not due process of law."

That the law of distress is not in conflict with the Federal Constitution was also held by the Court of Appeals of Kentucky in,—

Garnett et al. v. Jennings (1898), 44 S. W. 282, where the Court said:

"It is further objected by appellants that the whole law of distress is contrary to, and in conflict with, both the federal and state constitutions, as depriving the tenant of his property without

due process of law. But the words 'due process of law' do not necessarily imply a trial by jury, as seems to be contended on behalf of appellants. 'The better and larger definition of 'due process of law' is that it means law in its regular course of administration through courts of justice.' 2 Kent, Comm. 13. The words were intended to have the same meanings as the words 'by the law of the land' in Magna Charta. *Murray v. Improvement Co.*, 18 How. 276. But the remedy of the landlord by distress was in existence at the time of the adoption of the constitution, though greatly modified in the more oppressive features which appertained to it at the common law; and the appellants were not deprived of their right to a trial by jury, which they might have obtained by giving bond under sections 653 or 658 of the Code. Perceiving no error to the prejudice of appellants' substantial rights, the judgment is affirmed."

In *Ex parte Ah Fook* (1874), 49 Cal. 402, 406, the Court said:

"Mr. Justice Cooley (Cons. Lims. 356) says: 'Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.'"

Cooley's Constitutional Limitations, 4th Edition, Page 440, note 2, says:

"What is meant by 'the law of the land'? In this State, taking as our guide *Zylstra's Case*, 1 Bay, 384; *White v. Kendrick*, 1 Brev. 471; *State v. Coleman and Mazy*, 1 McMull, 502, there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of our constitution."

In *Tracy v. Ginzberg* (1906), 205 U. S. 170, 178, the Court said:

"Within the meaning of that amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercises of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country'."

In *Murray v. Hoboken Land & Improvement Company*, 18 How. 272, the validity of an Act of Congress entitled "An Act providing for the better organization of the treasury department" was in question; lands were seized and sold under a distress warrant authorized by this act. It was contended that this was in violation of "due process of law." The Court said:

"That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law'? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this, the answer must be twofold. We must examine the constitution itself, to see whether this process be

in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. * * *

"Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision, which restrains congress from authorizing such proceedings. For, though 'due process of law' generally applies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, (2 Inst. 47, 50; *Hoke v. Henderson*, 4 Dev. N. C. Rep. 15; *Taylor v. Porter*, 4 Hill, 146; *Van Zandt v. Waddell*, 2 Yerger, 260; *State Bank v. Cooper*, Ibid. 599; *Jones's Heirs v. Perry*, 10 Ibid. 59; *Greene v. Briggs*, 1 Curtis, 311), yet, this is not universally true. * * *

"As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the States, so far as we know without objection—for this purpose, at the time the constitution was formed."

Another leading case on "due process of law" is,—*Hurtado v. California*, 110 U. S. 516. There the Court after quoting from *Murray v. Hoboken Land & Improvement Co.*, in part as above, at page 528, said:

"The real syllabus of the passage quoted is, that a process of law, which is not otherwise for-

bidden must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country."

In *Lowe v. Kansas* (1895), 163 U. S., 81, 85, the Supreme Court again said:

"Whether the mode of proceeding, prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases."

A case identical in principle with the case at Bar is,—*McMillen v. Anderson* (1877), 95 U. S. 37. A tax collector seized certain property. The owner of the property so seized prayed an injunction restraining the defendant from selling the property. It was contended that the seizure was not due process of law. One of the contentions of the plaintiff was,—“The plaintiff was not permitted under the law of Louisiana to contest the claim of the State, until he had given security for the payment of costs and penalties as a condition for having a hearing. The law, therefore, establishes one rule for the rich and another for the poor. He who has neither wealth, nor wealthy friends to become his sureties, is not allowed a hearing under any circumstances. This is not due process of law.” The Supreme Court at page 42, said:

“Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal.

“But however that may be, it is quite certain

that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, arts. 296-309, inclusive. The act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction.

"But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue.

"It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another."

The plaintiff in the foregoing case was the person whose property had been seized and he was not allowed to contest the validity of its seizure until he had given security as required by the Statute, which is precisely the requirement of the Delaware attachment statute in question.

The settled practice in admiralty of requiring the defendant to give security for costs as a condition of his appearance (See Admiralty Rule 6 for the Southern District, Admiralty Rule 7 for the Eastern District; and United States Supreme Court Rule 25) has never been called in question, so far as we are aware, under the Fifth Amendment (the rule was enforced in *Rawson v. Lyon* (1883), D. C. 15 Fed. 381).

A similar point was involved in *Pacific Live Stock Co. v. Oregon Water Board* (1916), 241 U. S. 440. In that case, it was held that a state may without violating due process of law, require all claimants to the right to take the same water for irrigation purposes, to submit their claims to an administrative board and pay a fee for the expenses of the board in determining the relative rights of the various claimants. It was objected that the requirement of a payment of a fee as a condition of the right to come in and defend was itself a denial of due process of law. The Supreme Court denied this claim, saying, at page 453:

"In our opinion, the charge is not extortionate and its exaction is not otherwise inconsistent with due process of law."

A closely related question was passed on by the court in *York v. Texas* (1890), 137 U. S. 15. A defendant who resided outside the state was served with process in a judicial proceeding by service outside the state. He endeavored to appear specially in order to set aside the service. The right to come in and set such service aside has been held to be a constitutional right which cannot be denied under the Fourteenth Amendment to the Constitution. (*Riverside Mills v. Menefee* (1915), 237 U. S. 189). Under a statute in the State of Texas, however, no special appearances were allowed, and by operation of this statute a special appearance by defendant was converted into a general appearance. By his attempted appearance, the defendant, therefore, subjected himself to a personal judgment under the laws of the State of Texas. The Supreme Court held that such a statute was due process and that the Fourteenth Amendment could not be relied upon as invalidating such legislation, even though the defendant was required to

subject himself to a personal judgment in order to assert a constitutional right.

To the same effect are:

Kaufman v. Wootters (1891), 138 U. S. 285;

Western Indemnity Co. v. Rupp (1914), 235 U. S. 261, 272.

Requiring the defendant to give security for the payment of a judgment was held in *Capital Traction Co. v. Hof* (1898), 174 U. S. 1, 43-46, to be not an unreasonable obstruction of the enjoyment of a constitutional right. The Court there said:

"Legislation increasing the civil jurisdiction of justices of the peace to two or three hundred dollars, and requiring each appellant from the judgment of a justice of the peace to a court of record, in which a trial by jury may be had for the first time, to give security for the payment of the judgment of the Court appealed to, has not generally been considered as unreasonably obstructing the right of trial by jury, as is shown by the numerous statutes cited in the margin, from which it appears that the civil jurisdiction of justices of the peace has been increased to three hundred dollars in Pennsylvania, Ohio, Michigan, Kansas, Arkansas, Colorado and California; to two hundred and fifty dollars in Missouri; and to two hundred dollars in New York, Indiana, Illinois, Wisconsin, Delaware, North Carolina, Mississippi and Texas; and that the appellant is required (at least when the appeal is to operate as a supersedeas) to enter into a bond or recognizance, not only to prosecute his appeal, but to pay the judgment of the appellate court, in all those States except Pennsylvania; and in that State any corporation, except a municipal corporation, is required to give such a bond, but

other appellants are required to give bond for the payment of costs only. And we have not been referred to a single decision in any of those States that holds such a statute to be unconstitutional in any respect. * * *

"Upon the whole matter, our conclusion is, * * * that the right of trial by jury in the appellate court is not unduly obstructed by the provisions enlarging the civil jurisdiction of justices of the peace to three hundred dollars, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court; that the legislation of Congress upon the subject is in all respects consistent with the Constitution of the United States."

And this ruling in the *Hof* case was made notwithstanding the following language of the Supreme Court, in *Parsons v. Bedford et al.* (1830), 3 Peters, 433, *446:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

If requiring security for the payment of the judgment before the Constitutional right to trial by jury may be enjoyed, is not an unreasonable obstruction to the enjoyment of that right, how much less objectionable must be the requirement that appearance be entered by the giving of like security, for appearance in this manner has the sanction of settled usage from time immemorial.

McClenachan v. McCarty, 1 Dallas, 375, having shown what the settled usage in attachment proceedings was at the very hour of birth of the Federal Constitution; it having been shown that such procedure was the procedure of a majority at least of the original

thirteen states and was later adopted by other states; that this procedure was identical with one of the usual causes of procedure at common law and that what was, at the time of the adoption of the Constitution of the United States, the usual course of administration of justice, through courts, was grafted into that instrument under the name "due process of law"; and it having been shown that the procedure followed in the case at Bar is the identical procedure stated in *McClenachan v. McCarty*, it irresistibly follows (without reference to the principle of *McMillan v. Anderson*; *Traction Co. v. Hof* and other similar cases, (*supra*), that the procedure prescribed by the Delaware Statute and followed in the case at Bar is "due process of law."

SIXTH POINT.

A process of law which conforms to the statutes and decisions of a State and under which the defendant is given opportunity for defense in accordance with settled procedure of the State, will not be held unconstitutional merely because the defense might be made easier or more convenient for the defendant by a different procedure.

The procedure adopted in this case conforms to all the requirements of the Delaware statutes and decisions (see pages 1-15, *ante*). The defendant noted his appearance upon the record and he was represented by counsel. Being so represented and the case being strenuously contested at every subsequent step, no action thereafter taken could have been taken without defendant's knowl-

edge and without full opportunity to defend had he complied with the settled procedure of the State of Delaware.

The brief of plaintiff-in-error cites no case and after diligent search we have found no case in which this Court has held that a procedure of a state established and generally followed before the adoption of the Constitution and adhered to by the courts violated the due process clause of the Constitution.

In *Louisville & Nashville R. R. v. Schmidt* (1900), 177 U. S. 230, where the proceeding against the defendant was by rule and the defendant came in and had his appearance noted, the court held that such procedure did not conflict with due process under the Fourteenth Amendment, since the forms of procedure in state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied. As was said by Mr. Justice White, at p. 236:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa Central Railway v. Iowa*, 160 U. S. 389; *Wilson v. North Carolina*, 169 U. S. 586."

To the same effect is

York v. Texas, *supra*, p. 66.

which holds that a State Statute denying to a defendant the right to enter a special appearance for the purpose of contesting the jurisdiction of a court, without sub-

jecting himself to a personal judgment, is not a denial of due process within the meaning of the Fourteenth Amendment of the Constitution.

In *Miedreich v. Lauenstein* (1914), 232 U. S., 236, a mortgage on property of the defendant was foreclosed, the record showing on return of the service of process that the defendant had been personally served with process. On writ of error, it was alleged that the defendant had never been served with process, that the return of the sheriff was false, that the sheriff's bond was insufficient to indemnify the plaintiff-in-error, and that the judgment of foreclosure was not due process. In holding upon this state of facts that there was no denial of due process, Mr. Justice Day said, at p. 245:

"This court has recognized the difficulty of satisfactorily defining in general terms which shall apply to all cases what is meant by the term 'due process of law,' and the desirability of judicial determination upon each case as the question arises. *Davidson v. New Orleans*, 96 U. S. 97. If the exercise of judicial power be such 'as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs,' there has been no deprivation of due process of law. *Cooley on Constitutional Limitations* (7th Ed.), 506; *Leigh v. Green*, 193 U. S. 79, 87. And this court, speaking by Mr. Chief Justice Fuller, in *Leeper v. Texas*, 139 U. S. 462, 468, said: 'Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied. This language was quoted with approval in *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 393.'"

Chief Justice White, in *Simon v. Craft* (1901), 182 U. S., 427, at p. 437, said:

"But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defendant against it. *Louisville & Nashville Railroad Co. v. Schmidt*, 177 U. S. 230, 236, and cases cited. If the essential requisites of full notice and an opportunity to defend were present, this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case."

In *Iowa Central Railway Company v. Iowa* (1896), 160 U. S. 389, Mr. Justice White, delivering the opinion of the Court, at page 393, said:

"But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. . . . Whether the court of last resort of the State of Iowa properly construed its own constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the State empowered by the laws of the State to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the Con-

stitution of the United States or upon any act of Congress."

Mr. Justice Peckham, in *Wilson v. North Carolina*, (1898), 169 U. S. 586, at pages 593, 594, quotes with approval from *Allen v. Georgia* (1897), 106 U. S. 138, 140, as follows:

"To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff-in-error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State had acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff-in-error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

This statement is quoted with approval in *Horey v. Elliott* (1897), 167 U. S. 409, 443.

The contention of the plaintiff-in-error is not that there was in fact want of notice or opportunity to present his defense to the court, not that there was any irregularity in the long-established procedure of the courts of Delaware, which was a recognized form of procedure in England and in most of the States of the United States and in the Federal Courts following the adoption of the Constitution. His contention is not that he has been denied the right to appear specially and come in and defend the property seized on the attachment proceed-

ing in rem, for he did not ask so to appear; it is not that he may not now, under statutes of Delaware, if he chooses to do so, prove his defense and make claim upon the bond which plaintiffs below are obliged to give in order to secure the fruits of their judgment. But his claim is that there is a want of due process because the Courts of Delaware, following established procedure, denied to him the privilege of discharging the attachment without giving bail to the action, or because a statute might have been passed, before this action was begun, had the Legislature of Delaware seen fit to do so, which would have provided a way for him to appear generally and preserve the lien of the attachment.

SEVENTH POINT.

In reply to the brief of the plaintiff-in-error.

(a) *That part of the procedure of the defendants-in-error in the Delaware Courts, attacked by the plaintiff in error, is not the procedure on foreign attachment peculiar to the Custom of London, but is the practice adopted both under the Custom of London and by the Common Law and by modern statutes requiring appearance by special bail in actions of debt to recover more than £50.*

At page 86 of the brief of the plaintiff-in-error, in commenting upon the applicability to this case of the doctrine of *Murray v. Hoboken Land & Improvement Co.*, 18 Howard 272, 280, plaintiff-in-error says:

"It would suffice to say that it is not pretended that the procedure which is attacked in the present case was taken from the common or statute law of England or represented the settled

usage and mode of procedure of England. At most it was merely a local custom of a single community, the City of London."

Yet this is precisely what the defendants-in-error do contend, namely, that that part of the practice adopted by the defendants-in-error, which alone is attacked by plaintiff-in-error—the requirement that the defendant should appear by special bail—represents the settled usage and mode of procedure of England, as well as the procedure under the Custom of London.

There was nothing in the procedure in this case before the Delaware courts which operated to the prejudice of the plaintiff-in-error in any degree whatever or of which he makes any real complaint, except the requirement that the defendant should appear by special bail. Without this requirement, he does not show that he would have been deprived in any possible way of opportunity to present his defense. But this requirement, as we have shown at the pages of this brief 21-49, *ante*, was common not only to actions begun by foreign attachment under the Custom of London, but to all actions of debt at common law, whether begun by *capias*, attachment or *distingas*. It existed under both state and federal statutes and in the procedure in admiralty.

(b) *Plaintiff-in-error is mistaken in the statement in his brief as to the effect of the Delaware Attachment Laws as compared with attachment under the Custom of London.*

At page 29 of the brief of plaintiff-in-error, it is stated:

"His (the defendant's) elementary right of appearing and defending and protecting his property is thus made dependent upon his ability

to give bail in a sum fixed not by a Court but by his opponent in the litigation. In other words, the defendants in error made themselves *domini litis* not only so far as the presentation of their contentions to the Court was concerned, but they have thus far been enabled successfully to prescribe the conditions with which he whom they have cited into Court must comply before he may have his day in Court."

As previously pointed out in this brief, pp. 10-12, *ante*, both at common law and under the Delaware statutes, the practice is for the plaintiff to endorse the writ with the amount of bail required inailable actions, but it is always open to the defendant to make application to the Court to have bail reduced. This the defendant never did and, as appears by the Record, p. 36, the judgment taken after inquiry at bar exceeded the amount of the attachment.

Plaintiff-in-error also alleges various variances between the Delaware statutes and the Custom of London as follows (Brief of Plaintiff-in-Error, page 62):

That under the Custom of London

(1) The defendant could either render his body or give bail.

(2) He could then bring *scire facias* to put plaintiff to his proof.

(3) In an action of simple debt the defendant could wage his law.

(4) Before execution plaintiff was bound to give bond with sureties to restore to the defendant plaintiff's recovery, if defendant should within a year and a day come into court and disprove or avoid the debt.

(5) The plaintiff was also compelled to give a second bond to prosecute his original bill.

(6) Plaintiff swore to the amount of his claim, such affidavit constituting the foundation of the action which could be set aside for insufficiency.

(7) Money only could be attached.

As we have already seen, plaintiff-in-error is mistaken as to the 4th and 7th propositions. The plaintiff under the procedure in Delaware, as well as in the other attachment states, is required to give bond before taking the benefit of his judgment (see page 8 of this brief ~~15~~, *ante*). Property as well as money could be attached under the Custom of London as well as under numerous attachment statutes based on the Custom of London (see page of this brief 28, *ante*). The plaintiff under the Delaware statutes must begin his attachment action by affidavit which, however, may be the affidavit of a credible person other than the plaintiff. This affidavit, however, is open to attack for insufficiency by the settled practice in attachment proceedings (see page 9-15, *ante*).

The writ of *scire facias* which might be availed of by the defendant under the Custom of London and the bond to prosecute required by that Custom are entirely unnecessary to protect the interest of the defendant under the statutes of Delaware. Under the Custom of London, no judgment was taken (see Sergeant on Attachment, page 118). When the defendant had appeared by special bail under the Custom of London and *only then* could he put the plaintiff to his proof by resorting to *scire facias* (Sergeant, 48-49). Sergeant, at p. 48,

after referring to the requirement that the defendant render his body or appear by special bail, says:

"He then may bring a writ of *scire facias* which is called *scire facias ad disprobendam debitum*; and the plaintiff in the attachment must be summoned to appear and plead thereto."

Under the procedure in Delaware, upon the defendant's appearing by special bail, he is entitled to take the ordinary steps in the trial of litigation, resulting in a judgment. He, therefore, requires no writ of *scire facias* and can move to dismiss the proceeding for want of prosecution. The comments of the plaintiff-in-error on the differences between the Delaware practice and the Custom of London narrow down to the contention that the Delaware practice is unconstitutional because it failed to provide, as under the Custom of London, that the defendant might render his body in lieu of giving special bail, and that the defendant could not, as under the Custom of London, wage his law, a method of defense long since abandoned both in England and America.

(c) *The authorities principally relied upon by the plaintiff-in-error to establish the unconstitutionality of the requirement of the Delaware Statutes that the defendant in foreign attachment appear by giving special bail, do not sustain his contention.*

The decisions cited in support of the contention of plaintiff-in-error fall into three classes:

(1) The first class is made up of cases in which judicial or administrative officers by arbitrary action have so departed from established procedure as to cut off unconditionally the right of a defendant to be heard. Such cases are:

Hovey v. Elliott, 167 U. S. 409;
McVeigh v. The United States, 11 Wall. 259;
Windsor v. McVeigh, 93 U. S. 274;
Wetmore v. Karick, 205 U. S. 141;
Saunders v. Shaw, 244 U. S. 317;
Neal v. Delaware, 103 U. S. 370.

(2) A second class is made up of cases in which the Court passed upon a new form of statutory procedure not known to the common law, which procedure made no provision for giving the defendant opportunity to be heard. Obviously such statutes do not fall within the doctrine of *Murray v. Hoboken Land & Improvement Company*, as laid down by Mr. Justice Curtis, that due process means the "law of the land" as it existed at the time of the adoption of the constitution. Such cases are:

Central of Georgia Ry. v. Wright, 207 U. S. 127;
Security Trust Co. v. City of Lexington, 203 U. S. 323;
Londoner v. Denver, 210 U. S. 373, at 385;
Coe v. Armour Fertilizer Works, 237 U. S. 413;
Kaukauna Co. v. Green Bay Canal, 142 U. S. 254.

(3) A third class is made up of those cases in which the Court was without jurisdiction of the subject matter or the person of the defendant.

A seizure of the defendant's property under judgment rendered by a court having no jurisdiction, is obviously not due process. Such cases are:

Pennoyer v. Neff, 95 U. S. 714;
Scott v. McNeal, 154 U. S. 34;
Riverside Mills v. Menefee, 237 U. S. 189.

None of these three classes of cases impair the doctrine of *Murray v. Hoboken Land & Improvement Co.*, which in brief is that the due process clause of the Fifth Amendment, which is identical in point of substance with the due process clause of the Fourteenth Amendment, was not intended to, nor did it as a matter of law, interfere with or repeal those forms of procedure which were recognized and adopted by the common law.

Nor is the applicability of this doctrine to the case at bar affected by the decisions in *Hurtado v. California*, 110 U. S. 516, and *Twining v. New Jersey*, 211 U. S. 78, both of which cases are commented on at length in the brief of plaintiff-in-error at pages 78 and 79. In these cases it was held that an established common law procedure, which is due process within the meaning of the Fourteenth Amendment to the Constitution, is not so essential to constitutional procedure that it cannot be departed from by a new or improved or more convenient procedure. Although appearance by special bail is an established process of common law, there is nothing in the constitution which requires any state to continue to use that process. It is perhaps unnecessary to say that it does not follow that because a state may constitutionally change its established procedure, it must do so under penalty of violating the due process clause of the Federal Constitution. That such change is not compulsory was the precise point determined in *Murray v. Hoboken Land & Improvement Company*.

The case of *Roller v. Holly*, 176 U. S. 398, referred to at page 42 of brief of plaintiff-in-error, dealt exclusively with the question of whether five days' notice to a citizen of Virginia to appear and defend an action in the courts of Texas was reasonable notice within the meaning of the due process clause and, of course, such notice was held not to be reasonable. The action in the case at bar having been begun by attachment, and the

defendant having had actual notice of the attachment and abundant time to make his appearance, and having actually noted his appearance on the record and contested every step of the litigation, is not prejudiced by want of notice and cannot raise the question of the insufficiency of the notice. See our comments on *Pennoyer v. Neff* and *Central Loan & Trust Co. v. Campbell* at page 54, *ante*, of this brief.

In *Herbert v. Bicknell* (1914), 233 U. S. 70, the plaintiff brought an action of assumpsit by garnishment against a non-resident. The defendant appeared specially to set aside the service of summons on the ground that it was insufficient under the due process clause. The statute required that service of process in garnishment proceedings should be made by leaving the summons at the "last place of abode" within the jurisdiction. The defendant's affidavits showed that his actual place of abode was in Australia at the time the action was begun and that the place where the summons was left was at a place where he had stopped within the jurisdiction since making Australia his place of abode, and that the place where the summons was left had never been his place of abode. The Court said, at page 73:

"Really the only matter before us that calls for a word is the decision that a judgment appropriating property within the jurisdiction to payment of the owner's debt, which would be good if the property itself were the defendant, is not made bad by the short and somewhat illusory notice to the owner. Upon this point the Court below relied upon the above §2114 and *Pennoyer v. Neff*, 95 U. S. 714, 727: 'The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that the seizure will inform him, not only that it is taken into the

custody of the Court, but that he must look to any proceeding authorized by law upon such seizure for its condemnation and sale.' It has been said from of old that seizure is notice to the owner. *Scott v. Shearman*, 2 W. Bl. 977, 979. *Mankin v. Chandler*, 2 Brock. 125, 127. See *Cooper v. Reynolds*, 10 Wall. 308, 317.

"Summons of the defendant's debtor by garnishment is given like effect in express terms by §2114. 'Such notice (*i. e.*, service on the garnishee) shall be sufficient notice to the defendant to enable the plaintiff to bring his action to trial unless the defendant be an inhabitant of this territory, or has some time resided therein, and then a like copy shall be served personally upon him, or left at his last and usual place of abode.' This statute was in force, no doubt, before the debt garnisheed was contracted and gave the defendant notice that he must be ready to be represented in order to save a default if the debt was attached. If he had appeared, nothing shows that proper time would not have been allowed to produce evidence at the trial. The District Court has jurisdiction over small debts only. Rev. Laws of Hawaii, §1662. Its proceedings naturally are somewhat summary. It appears that the defendant had knowledge of the action before the time for a writ of error had expired and when it may be that it still would have been possible to set aside the judgment and to retry the case. He did not adopt the course that would have opened effective ground of attack even as the record stood. We cannot discover that he has suffered any injustice—still less that he has been subjected to an unconstitutional wrong."

To the same effect, under the 14th Amendment, see *Gallup v. Schmidt* (1902), 183 U. S. 300.

See also

Louisville and Nashville R. R. v. Schmidt (1901), 177 U. S. 230, *ante*, p. 70.

The case of *Eckerson v. Board of Trustees of Haverstraw*, 151 N. Y. 75, referred to at length in the brief of plaintiff-in-error, at pages 24 to 26, was decided in 1893 and arose under the provisions of the Constitution of the State of New York, which provided in substance that when land is taken by eminent domain, the amount of compensation must be fixed by a "jury" or by commissioners of appraisal. A statute created a new and non-constitutional body for the fixing of compensation in such cases but provided that an appeal might be had from the determination of such non-constitutional body for a new award by commissioners of appraisal, provided the appellant gave security for the costs of the appeal in the event that on his appeal the award was not at least \$20 greater than the award made below. As the Court pointed out, this statute would operate to compel the landowner if he did not increase the amount of the award by more than \$20 by his appeal, to pay the expenses of condemning his own land in the manner provided by the constitution. This in itself was unconstitutional since it would deny to appellant his constitutional right to just compensation for the land taken. It was so held in *Matter of New York & West Shore R. R. Co.*, 94 N. Y. 287, at p. 294. In *Eckerson v. Board of Trustees of Haverstraw*, supra, the Court said at page 86:

"In such a case to compel the landowners to pay any part of the expense incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the landowners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to

reduce it. In the present case the costs allowed are small compared with the amount of the award, which was \$35,000, but that can make no difference in the principle. If the company can recover against the landowner the expenses of proceedings carried on by it for its own benefit, where the award is large, it may do the same when the award is small; and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole of the award. There is no warrant in the statute for awarding such costs, and if there were, it would be a violation of the constitutional right of the landowner."

The Court undoubtedly indulged in language indicating an opinion that the requirement of any security on appeal to the constitutional form of court was unconstitutional as denying due process of law because it placed an undue burden on the enjoyment of a constitutional right, but this precise question arose in somewhat slightly different form two years later in *Capital Traction Co. v. Hof* (1898), 174 U. S. 1, in which it was held that the right of trial by jury under the 7th amendment of the United States Constitution is not infringed by an act of Congress enlarging the jurisdiction of the Justice of the Peace Courts in the District of Columbia to \$300 and requiring every appellant from such a judgment to enter into an undertaking with sureties to pay and satisfy the final judgment of the Appellate Court. See pages 67-68, *ante*, of this brief. The requirement of security, therefore, as a condition of the enjoyment of constitutional right, cannot be deemed to be a denial of the right at least where the requirement for security is reasonable, and in the case at bar the best test of whether the requirement for security was reasonable in amount is the judgment actually obtained after inquisition at bar which exceeded the amount

of the bail required. Moreover, the amount of security required cannot be deemed to be so unreasonable as to deny the plaintiff-in-error a constitutional right if he did not avail himself of his right to apply to the court to mitigate the bail (see pages 9-15, *ante*). The best test of the reasonableness of the legal requirement of bail is the test of due process as laid down in *Murray v. Hoboken Land & Improvement Co.*, *supra*, that is to say, the test of the law of the land as it existed for some centuries before the adoption of the Fifth Amendment and as it existed in a large number of states at the time of the adoption of the Fourteenth Amendment.

In *Matter of Rochester v. Holden*, 224 N. Y. 386, at p. 396, referred to in the brief of the plaintiff-in-error at page 26, a non-constitutional body for the fixing of compensation to the landowner was created by statute, but, as stated by the Court at page 396,

"In case of rejection or disapproval of it (the report of the non-constitutional body) the decision of the common council is in effect as to a landowner final and conclusive."

It thus appears that the effect of the statute was to conclude the right of the landowner by the determination of a non-constitutional body in fixing compensation in condemnation proceedings and thus in one aspect deny absolutely to the landowner the right to a trial before a constitutional court. Neither this case nor *Eckerson v. Board of Trustees*, *supra*, therefore, necessarily has any bearing on the question here presented.

The defendants-in-error do not contend that a constitutional amendment may not nullify a pre-existing statute of a state, as argued by plaintiff-in-error, at pages 68 *et seq.* of his brief, citing *Neal v. Delaware*, 103 U.

B. 370; *Kaukauna Co. v. Green Bay Canal*, 142 U. S. 234, and *Wilkins v. Jerrett*, 139 Mass. 29, when that is the plain construction or necessary implication of the constitutional amendment. But that any such construction or implication is possible with respect to the due process clause when applied to an established procedure as well recognized and generally accepted as the practice of holding to special bail is negatived by the decision in *Murray v. Hoboken Land & Improvement Co.* In *Kaukauna Co. v. Green Bay Canal*, the Supreme Court held that there was no taking of the property of the plaintiff-in-error without due process of law. The Court, however, took occasion to say that a local improvement statute enacted before the adoption of the Fourteenth Amendment providing for the summary taking of private property without compensation would be nullified by the Fourteenth Amendment, a doctrine which would appear to have no application to the case at bar.

Having shown that the practice adopted by the defendant-in-error under the Delaware statutes of holding the defendant to special bail is founded both on the Custom of London in attachment proceedings which was a part of the common law and on the universal practice at common law of requiring special bail in debt actions to recover more than \$50, and having shown that both attachment and the requirement of special bail in debt actions were settled practice in most of the states of the United States at the time of the adoption of the Constitution, recognized and followed in Federal Statutes and by the practice in admiralty, it follows that the practice adopted by Defendant-in-error is in accordance with the "law of the land," as defined in *Murray v. Hoboken Land & Improvement Company* and is, therefore, due process of law within the meaning of both the Fifth and Fourteenth Amendments to the Constitution.

(d) *The Delaware Statutes do not deny to any person within the jurisdiction of Delaware the equal protection of the laws.*

(1) *The plaintiff-in-error is not within the jurisdiction of Delaware, within the meaning of the term "jurisdiction" as used in the guaranty of equal protection given by the Fourteenth Amendment.*

The plaintiff-in-error, at page 87 of his brief, asserts that the Delaware Statute deprived the plaintiff-in-error of the equal protection of the laws, because the plaintiff-in-error, a non-resident, was not permitted to appear and defend without giving special bail, while a foreign corporation may appear and defend without giving special bail.

The plaintiff-in-error assumes that he is within the jurisdiction of Delaware within the meaning of the clause guaranteeing equal protection of the laws. He does not attempt to show that he is within the jurisdiction of Delaware, within the meaning of that clause. It is essential, however, that, in order to invoke the protection of that clause, he be within the jurisdiction. As was said by Mr. Justice Harlan, delivering the majority holding in *Blake v. McClung* (1898), 172 U. S. 239, 260:

"That prohibition manifestly relates only to the denial by the State of equal protection to persons 'within its jurisdiction.' Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction' while those words are found in the succeeding clause relating to the equal protection of the laws. The Court cannot assume to say that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument."

Inasmuch as the plaintiff-in-error has not shown that he is within the jurisdiction of Delaware, within the meaning here under discussion of that term, he has not shown that his constitutional rights have been violated, and hence he cannot complain of the decision of the Supreme Court of Delaware. In fact, the plaintiff-in-error has never been within the jurisdiction of Delaware, within the meaning now under discussion of that term. He is a non-resident, has neither been personally served with process nor appeared in the action, and no judgment *in personam* has been or can be had against him.

In *Blake v. McClung*, it appeared that a statute of Tennessee gave priority, in the distribution of assets and the payment of debts of corporations belonging to a certain class, to creditors residing in Tennessee. The Embreeville Company, which was a corporation belonging to that class, became insolvent, and a general creditors' bill was filed to wind up its affairs. The Hull Coal and Coke Company, a corporation of Virginia, filed an intervening petition, showing that it had an undisputed claim against the Embreeville Company for coke sold and shipped from Virginia to the Embreeville Company at its place of business in Tennessee. The Tennessee Court, in which the creditors' bill was filed, decreed that the Tennessee creditors should be paid off in full before the Hull Coal and Coke Company received anything on account of its claim. The Hull Coal and Coke Company contended that the statute of Tennessee denied to it the protection which the statute gave to residents of Tennessee. This contention was overruled, the majority opinion, delivered by Mr. Justice Harlan, holding (172 U. S., at page 261):

"Without attempting to state what is the full import of the words 'within its jurisdiction', it is safe to say that a corporation not created by Tennessee, nor doing business there under

conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee. . . .

It does not appear to have been doing business in Tennessee under the Statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process by its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the Amendment, simply by presenting its claim in the state court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the People, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the State of Tennessee (although such private corporations may be creditors of a corporation doing business in the State under the authority of that statute) to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the 'equal protection of the laws' secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed."

It seems that, on this point, the case at bar is not distinguishable from *Blake v. McClung*. The plaintiff-in-error is no more within the jurisdiction of Delaware because he owns stock in a Delaware corporation which was subject to attachment, than the Virginia corporation was within the jurisdiction of Tennessee because a corporation doing business in Tennessee owed it a debt, which was properly subject to attachment there. Nor does

the plaintiff-in-error come within the jurisdiction of Delaware because an action is begun against him by the process of foreign attachment any more than the Virginia corporation came within the jurisdiction of Tennessee by presenting its claim in the Tennessee courts, thereby becoming a party to an action there.

In a later case, *Sully v. American National Bank* (1900), 178 U. S. 289, Mr. Justice Peckham, speaking for the court, said, at page 303, in reference to another section of the Tennessee statute under consideration in *Blake v. McClung*:

"The principle is not altered by the fact that in this case the creditor had a mortgage which was postponed while in the case cited his debt was unsecured, but it was also postponed to the Tennessee creditor.

"Nor can we see that there has been any denial by the State of Tennessee to any person within its jurisdiction of the equal protection of the laws. Upon this point, also we refer to the same case of *Blake v. McClung*, where at page 260, the question is decided.

"These two last points would apply also to the mortgage of the Travelers' Insurance Company. That company being a corporation of the State of Connecticut could not raise the question of a denial of any privilege or immunity as such citizen, under the provision of section 2, article IV, of the Constitution. *Blake v. McClung, supra*. But the questions as to the deprivation of property without due process of law and of being denied the equal protection of the laws are raised by that corporation, and must be decided in a way similar to the case of *Carhart*."

See also

Phila. Fire Assn. v. New York (1886), 119 U. S. 110.

In State v. Travelers' Ins. Co. (1898), 70 Conn. 590, it was squarely held that a non-resident was not within the jurisdiction of Connecticut, within the meaning of the equal protection clause, merely because he owned stock in a Connecticut corporation, Mr. Justice Baldwin holding at page 599:

"Regarding the shareholders in question simply as so many persons, residing without this State, there can be no ground for claiming that they cannot be charged with the tax in controversy, by reason of the declaration in the Fourteenth Amendment to the Constitution, that no State shall deny to any person within its jurisdiction the equal protection of the laws. This inhibition is only for the benefit of persons who are physically present within the territorial jurisdiction of the State, the protection of whose laws they invoke."

This rule was laid down in *State v. Travelers' Ins. Co.* notwithstanding the fact that, in the same case, an objection that the law in question, imposing a tax upon shares of stock in a domestic corporation held by non-residents was an attempt "to impose a tax upon personal property outside the jurisdiction and beyond the territory of the State" was overruled (70 Conn., at page 603).

It is submitted that in the light of the decisions in *Blake v. McClung*, *Sully v. American National Bank* and *State v. Travelers' Ins. Co.*, that the plaintiff-in-error is not within the jurisdiction of Delaware, as the term jurisdiction is used in the Fourteenth Amendment, and hence is not entitled to the equal protection of the laws guaranteed by that amendment.

(2) *The plaintiff-in-error is not deprived of the equal protection of the laws.*

There is no deprivation of the equal protection of the laws merely because there is a classification of persons within the jurisdiction with respect to the operation of any law. This is conceded by the plaintiff-in-error at page 87 of his brief.

“Undoubtedly it lies within the legislative power to classify the subjects and objects of legislation.”

The plaintiff-in-error, however, contends that the classification in the case at bar is arbitrary and capricious, and in support of his contention, he cites, together with decisions from several State Courts, the following cases decided by this Court:

- Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79;
- Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560;
- Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150;
- F. S. Royster Guano Co. v. Virginia*, 252 U. S.—40 Sup. Ct. Rep. 560.

These four cases are the only cases in this court, or in the federal courts, cited by the plaintiff-in-error under Point II of his brief. He does indeed refer to *Fort Smith Lumber Co. v. Arkansas*, 251 U. S. 532, in this connection, but he admits that this last case is not an authority in support of his position. As a matter of fact, as will be hereafter pointed out, this last case is in conflict with the contention of the plaintiff-in-error.

In none of these four cases did it appear that the classification, which was held to be contrary to the Fourteenth Amendment, was a classification distinguishing individuals as such from corporations as such. On the

other hand, in two cases in this court it has been squarely held that a State may place individuals in one class and corporations in another class.

Standard Oil Co. v. Tennessee, 217 U. S. 413;
Fort Smith Lumber Co. v. Arkansas, 251 U.
 S. 532.

The four cases cited are all distinguishable from the case at bar, and are not in point here. The classification in the case at bar does not distinguish between one stock yard and other stock yards owned by individuals or by corporations, as in *Cotting v. Kansas City Stock Yards Co.*; or between the right of producers of agricultural products or live stock to combine in restraint of trade, and the right of other persons, individuals or corporations, so to combine, as in *Connolly v. Union Sewer Pipe Co.*; or between costs to be awarded in suits against railway companies as distinguished from all other individuals and corporations, as in *Gulf, Colorado and Santa Fe Ry. v. Ellis*; or for the purpose of fixing taxation on income earned without the state between domestic corporations doing part of their business in the state and domestic corporations not doing any business in the state, as in *F. S. Royster Guano Co. v. Virginia*. The Delaware statutes distinguish between non-resident individuals and foreign corporations, and such a distinction is not in violation of the Fourteenth Amendment.

In *Fort Smith Lumber Company v. Arkansas*, 251 U. S. 532, it appeared that by a statute of Arkansas, a corporation was not entitled for taxation purposes to deduct from the value of its stock the value of stock which it held in other corporations which latter had already paid full taxes, and was subject to a suit for back taxes.

An individual was not taxed for stock so held or subject to suit for back taxes. It was contended that this discrimination was contrary to the Fourteenth Amendment. The Court, speaking by Mr. Justice Holmes, overruled this contention, saying (251 U. S., at page 534) :

"A distinction between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law.

"The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the state."

It will be noted that, as was said in *Fort Smith Lumber Company v. Arkansas*, "it is to be presumed, until the contrary appears," that there is a reason for a classification. In other words, the plaintiff-in-error does not make a *prima facie* showing that the Fourteenth Amendment is violated by showing merely that there is a classification, he must go further, and show that the classification is arbitrary. In the case at bar he has not done this, and for this reason alone, it would be proper to overrule his contention.

In fact, however, there is justification, founded on the law of Delaware as interpreted by the decisions of its courts, for the distinction made by the Delaware attachment statutes between foreign corporations and non-resident individuals. The reason for the classification appears in the decision in *Vogle v. New Granada Canal Co.*, decided in 1856, and reported in 1 Houston, 294.

This was a foreign attachment case against a foreign corporation. The defendant obtained a rule upon the plaintiff to show cause wherefore the attachment should not be stricken off, or otherwise should not be dissolved on the defendant's entering a common appearance to the action. The Court held (1 Houston, 298, 299) that the writ of attachment must be stricken off, and delivered the following opinion:

"It has always been our opinion, and in this we believe the bar of the State has generally concurred, that an act of Assembly in regard to foreign attachments does not extend to foreign corporations. It is true that the word person, occurring in the act, may and would embrace a corporation, as an artificial, though not a natural person, if there was nothing in the act itself, or in the mode of proceeding, or in the remedy authorized and prescribed by it, to preclude its application to the case of a foreign corporation. It is not the object or policy of the law, however, to seize and appropriate the property of any debtor without a hearing and an opportunity of defense against the demand, and therefore one of the principal objects of all attachment process, under the act in question, is to compel the appearance of a debtor beyond the jurisdiction of the Court, and to secure special bail to the plaintiff's action, on which the attachment is to be dissolved and the property attached to be discharged, and the action is then to proceed to trial and judgment in the usual form. But a corporation cannot put in special bail or be surrendered to bail when it appears, if we could compel it in this mode to appear; and as the legislature has made no provision by which a foreign corporation can put in special bail, or enter into security to the plaintiff to defend and abide the result of the action when it appears to the attachment; it must be held and considered that

the statute does not contemplate or include the case of a foreign corporation.

"The writ of foreign attachment in this case must therefore be stricken off, and the first branch of the rule made absolute."

Here, then, is the reason for the distinction. The corporation is not held to special bail because in the language of the Delaware court, "a corporation cannot put in special bail, or be surrendered to bail when it appears," the whole procedure of requiring appearance by special bail in foreign attachment under the Custom of London, and in common law actions of debt against individuals, being inapplicable to corporations. The Delaware Legislature recognized that a corporation could not be held to special bail when in 1857 (the year following the decision in *Vogle v. New Granada Canal Co.*) it extended the operation of the foreign attachment laws to foreign corporations, without requiring special bail, and in lieu thereof, continuing the lien of the attachment after a common appearance.

This statute of 1857 is Chapter 424 of Volume 11 of the Laws of Delaware, entitled:

**"A SUPPLEMENT TO CHAPTER 104 OF THE
REVISED STATUTES OF THE STATE
OF DELAWARE.**

"Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met, as follows, to wit:

"Section 1. A writ of foreign attachment may be issued out of the Supreme Court of this State, against any corporation, aggregate or sole, not created by or existing under the laws of this State, upon affidavit made by the plaintiff or any other credible person, and filed with the Prothonotary of said Court, that the defendant is a

corporation not created by or existing under the laws of this State, and is justly indebted to the said plaintiff in a sum of money to be specified in said affidavit and which shall exceed fifty dollars.

"Section 2. That said writ shall be framed, directed, executed and returned, and like proceedings had as in the case of a foreign attachment issued under the chapter to which this act is a supplement, except that attachments to be issued under this act shall be dissolved only in the manner hereinafter provided.

"Section 3. In any attachments to be issued under this act, judgment shall be given for the plaintiff at the second term after the issuing of the writ, unless the defendant shall have caused an appearance by attorney to be entered, in which case the like proceedings shall be had as in suits commenced against a corporation by summons. *Provided*, however, that an appearance by attorney to be entered as aforesaid, shall not dissolve the attachment, but the same shall continue to bind the property or money attached as in other cases, unless the defendant shall, upon causing such appearance to be entered, also bring into Court the sum of money specified as the plaintiff's demand in the affidavit to be filed as aforesaid, with all costs then accrued, or unless he shall give security in such form and to such amount as the court may direct for the payment of any judgment that may be recovered in said proceedings with costs. Money brought into court under the provisions of this section shall abide the final judgment in the cause, and thereupon shall by the order of the court, or of the Chief Justice in vacation, be applied in satisfaction of such judgment as may be recovered by the plaintiff, or if judgment be rendered for the defendant the same shall be refunded to him: *Provided*, however, that no disposition of said sum of money shall be made until after the expiration of one

month from final judgment as aforesaid, and if within said period a writ of error be taken to said judgment, the said sum of money shall remain in the court subject to the determination of the proceedings in error."

Passed at Dover, March 2, 1857.

This statute is substantially the same as the statute at present in force in Delaware permitting attachment against foreign corporations. The present statute is set out at pages 12-14 of the brief of the plaintiff-in-error.

This statute, as well as the decision in *Vogle v. New Granada Canal Co.*, recognizes, in the language of the Delaware Court, that "a corporation cannot put in special bail, or be surrendered to bail when it appears," and hence does not require special bail from a foreign corporation on appearance, while it does require special bail from an individual non-resident.

In view of these facts, the resemblance between the situation in the case at bar and that presented to the Court in *Standard Oil Co. v. Tennessee*, 217 U. S. 413, becomes more apparent.

The opinion of the Court (which sufficiently states the facts) in *Standard Oil Co. v. Tennessee*, on the question of the 14th Amendment, is as follows (217 U. S., (pp. 419-421) :

"The plaintiff-in-error is a Kentucky corporation and seeks to reverse a decree of the Supreme Court of Tennessee forbidding it to do business, other than interstate commerce, in the latter state. 120 Tennessee, 86. The ground of the decree is that the corporation and certain named

agents entered into an arrangement for the purpose and with the effect of lessening competition in the sale of oil at Gallatin, Tennessee, and with the further result of advancing the price of oil there. The acts proved against the corporation were held to entail the ouster under a statute of Tennessee. Act of March 16, 1903. The corporation brings the case here on the contentions that the statute as construed by the Court is contrary to the Fourteenth Amendment and also is an unconstitutional interference with commerce among the states.

"The basis of the former contention is that by §3 of the act any violation of it is made a crime, punishable by fine, imprisonment or both, and that this section has been construed as applicable only to natural persons. *Standard Oil Co. v. The State*, 117 Tennessee, 618. Hence, it is said, this statute denies to corporations the equal protection of the laws. For although it is addressed generally to the prevention of a certain kind of conduct, whether on the part of corporations or unincorporated men, the latter cannot be tried without a preliminary investigation by a grand jury, an indictment or presentment, a trial by jury, the right to an acquittal unless their guilt is established beyond a reasonable doubt, and the benefit of a statute of limitations of one year. Corporations, on the other hand, are proceeded against by bill in equity on relation of the Attorney General without any of these advantages, except perhaps the right to a jury. Complaint is not made of the difference between fine or imprisonment and ouster, but it is insisted that this is a general criminal statute, that ouster is a punishment as much as a fine, and that it is not a condition attached to the doing of business by foreign corporations, *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 409, or indeed a regulation of the conduct of corporations as such at all. Therefore the plaintiff-in-error complains that it is given a wrongful immunity from the proce-

ture of the criminal law. This suit is for the same transaction for which, in the earlier case cited above, an agent of the company was indicted and fined.

"The foregoing argument is one of the many attempts to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. The Law of Tennessee sees fit to seek to prevent a certain kind of conduct. To prevent it the threat of fine and imprisonment is likely to be efficient for men, while the latter is impossible and the former less serious to corporations. On the other hand, the threat of extinction or ouster is not monstrous, and yet is likely to achieve the result with corporations, while it would be extravagant as applied to men. Hence, this difference is admitted to be justifiable. But the admission goes far to destroy the argument that is made. For if a fundamental distinction may be made in the evils that different delinquents are forced to suffer, surely the less important and ancient distinction between the modes of establishing the delinquency, according to the nature of the evil inflicted, even more easily may be justified. The Supreme Court of the state says that the present proceeding is of a civil nature, but assuming that nevertheless it ends in punishment, there is nothing novel or unusual about it. We are of opinion that subjection to it, with its concomitant advantages, is not an inequality of which the plaintiff-in-error can complain, although natural persons are given the benefit of the rules to which we have referred before incurring the possible sentence to prison, which the plaintiff-in-error escapes."

The analogy between *Standard Oil Co. v. Tennessee* and the case at bar is very close. In *Standard Oil Co. v. Tennessee* the distinction was as in the case at bar, between individuals and corporations, and in *Standard Oil Co. v. Tennessee* one kind of punishment, imprison-

ment, was provided for individuals, another, oaster, for corporations, and this because of the impossibility of imprisoning a corporation; while in the present case, an individual is held to special bail, and a corporation is not, because, as was said in *Vogle v. New Granada Canal Co.*, "a corporation cannot be surrendered to bail when it appears." In fact, it is submitted that *Standard Oil Co. v. Tennessee* is not to be distinguished from the case at bar, and that it is controlling on this branch of the case.

The plaintiff-in-error, in addition to the Supreme Court decisions already distinguished, has also cited several decisions in various state courts. Of all of these decisions, except *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, and *Phipps v. Wisconsin Central R. Co.*, 133 Wis. 153, it is enough to say that in each case the classification condemned was not a classification of individuals as such and of corporations as such, and hence these decisions are distinguishable on grounds similar to those on which the four cases in the Supreme Court of the United States have been distinguished.

In *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, it appeared a statute of California provided that if a corporation doing business in the state did not pay an employee promptly, the employee should have a lien on all the property of the corporation prior to any other claim against the corporation except recorded mortgages or deeds of trust. This provision gave to employees of the corporation a priority over all other creditors, individual or corporation. The statute was held unconstitutional.

In *Phipps v. Wisconsin Central R. Co.*, 133 Wis. 153, it was held that it was contrary to the Fourteenth Amendment to enact that there could be an examination

before trial of a former employee of a corporation, but that there could not be such an examination of a former employee of an individual.

If these two cases merely hold that in the peculiar situations presented the classifications, distinguishing individuals as such from corporations as such were arbitrary and hence unconstitutional, they do not support the contention of the plaintiff-in-error that the classification made by the Delaware statutes in the case at bar is arbitrary and capricious. If they are to be considered as holding that there can be no classification distinguishing individuals as such from corporations as such, they are contrary to the decisions in *Standard Oil Co. v. Tennessee* and *Fort Smith Lumber Co. v. Arkansas*, and hence are to be disregarded here.

The plaintiff-in-error, in order to show that he is denied the equal protection of the laws guaranteed by the Fourteenth Amendment, must show both that he is within the jurisdiction of the State of Delaware, as that term is used within the meaning of such guaranty, and that he is denied the equal protection of the laws. If he fails to show either one, he fails to show that his constitutional right is violated. In the case at bar, not only has he shown neither, but it has been shown that he is neither within the jurisdiction, as that term is used in the Fourteenth Amendment, nor is he denied the equal protection of the laws.

EIGHTH POINT.

The judgment of the Supreme Court of Delaware should be affirmed.

WILLARD SAULSBURY,
HARLAN F. STONE,

Of Counsel.

NOV 22 1920

JAMES D. WAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 99.

JAMES OWNBHEY,

Plaintiff-in-Error,

against

JOHN PIERPONT MORGAN, and others, as Ex-
ecutors of the Estate of J. Pierpont Morgan,
deceased.

MEMORANDUM FOR PLAINTIFF- IN-ERROR.

LOUIS MARSHALL,
Counsel for Plaintiff-in-Error.

FILED

NOV 22 1920

JAMES D. WAHER,
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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 99.

JAMES OWNBEY,

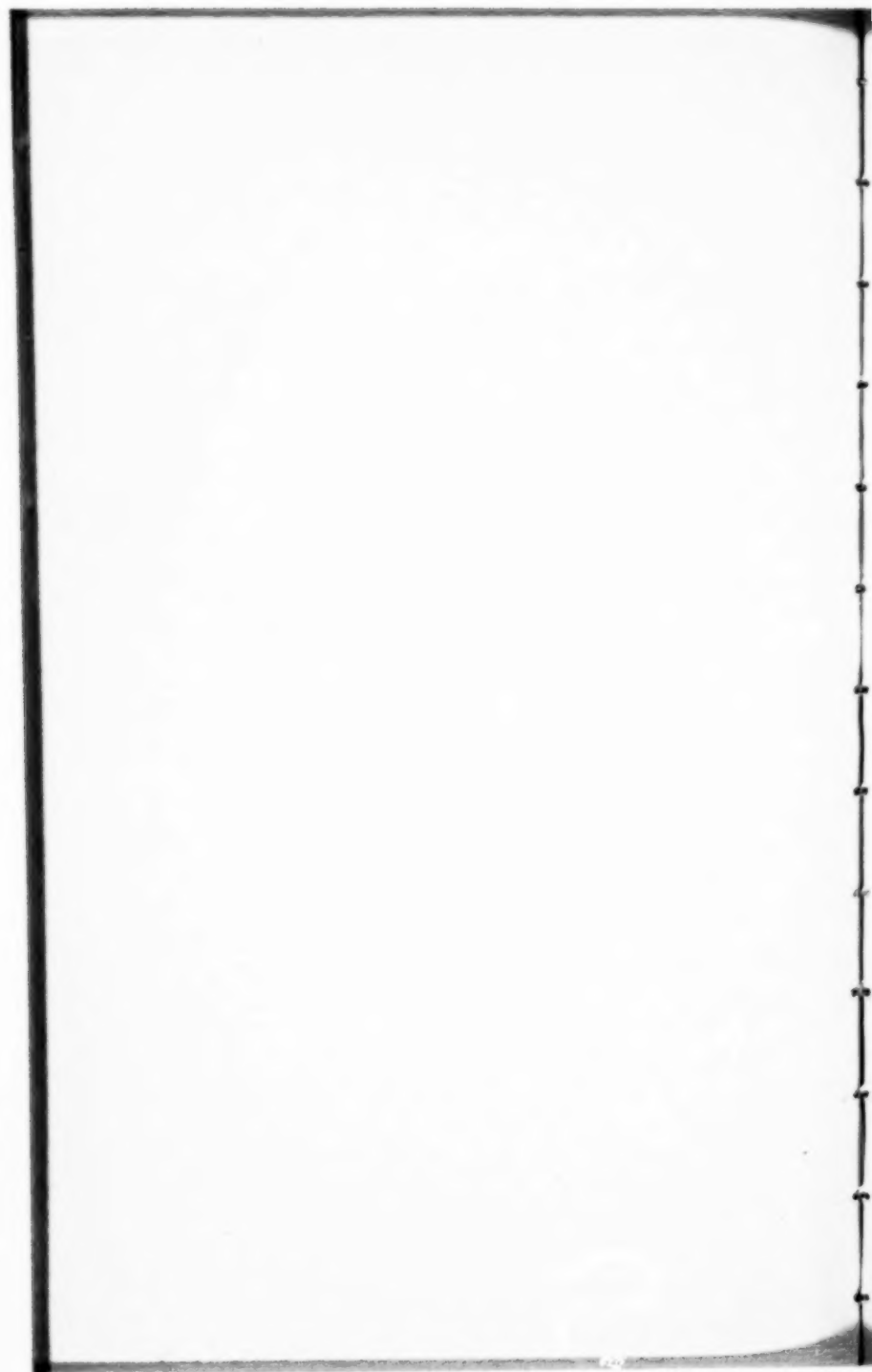
Plaintiff-in-Error,

against

JOHN PIERPONT MORGAN, and others, as Ex-
ecutors of the Estate of J. Pierpont Morgan,
deceased.

MEMORANDUM FOR PLAINTIFF- IN-ERROR.

LOUIS MARSHALL,
Counsel for Plaintiff-in-Error.



Supreme Court of the United States

OCTOBER TERM, 1920,

JAMES OWNBAY,
Plaintiff-in-Error,

against

JOHN PIERPONT MORGAN, and
others, as Executors of the Es-
tate of J. Pierpont Morgan,
deceased.

No. 99.

MEMORANDUM FOR PLAINTIFF-IN- ERROR.

By permission of the Court the following additions are made to the Points of the plaintiff-in-error:

I.

The Court is requested to insert at the middle of page 62 the following:

In a note appearing in 20 *Earl of Halsbury's Laws of England*, at page 286, the statement is made that foreign attachment under the Custom of London has become practically obsolete in consequence of the decisions rendered by the Court

of Appeal in *London Corporation vs. London Joint Stock Bank*, L. R. 5 C. P. Div., 494-505, and by the House of Lords in L. R., 6 App. Cas., 393. Attention is especially called to the opinion of Lord Justice Bramwell in the Court of Appeal at pages 503-505, and to the opinions of Lord Chancellor Selborne and Lord Blackburn in the House of Lords. In these opinions it was pointed out that in order to give the Custom validity it was based upon a fiction which was not carried out in practice and the proceedings were thereby rendered ineffective. That fiction was that a plaint had been made against the debtor and had been returned *nihil*. This necessarily presupposed notice and an opportunity for a hearing, when in fact there was neither notice nor a hearing.

The arguments of Judah P. Benjamin, Q. C., which appear in the report, are interesting and expressive of the views of a great lawyer familiar with American jurisprudence. He said:

"It is contrary to the principles of law to make the holder of another man's property hand over to a third person that property when the person to whom it belongs has never received notice that his rights to it are to be called into question. The custom set up here is that that may be done—but that is contrary to law,—and the special case shows that an unlawful and surreptitious mode of procedure is sought to be followed. That cannot be allowed."

It is also shown in these opinions that the garnishment proceedings under the Custom of London

were not regarded as proceedings at common law, but that the Custom was local and limited in character.

This was also expressly adjudged in *Pennsylvania Steel Co. vs. New Jersey Southern Ry. Co.*, 4 Houston (Del.), 578.

II.

The Court is requested to add before subdivision (2) on page 66 the following:

The claim is made that Ownbey could have resorted to various expedients which would have mitigated the rigor of the requirement that he give bail in the sum of \$200,000 as a condition to his right to appear and defend, and that, therefore, he is not in a position to claim that he was deprived of due process of law. This contention is unsound.

(1) On the argument it was said that he might have appeared specially without giving bail.

In the brief of defendants-in-error, after citing authorities, it is said, on page 25:

"In other words, the defendant could not appear even specially without putting in special bail."

There is nothing in the Delaware decisions or in works on Delaware practice, so far as we have been able to discover, that in any way recognizes a special appearance in the absence of special bail. There is nothing in the Code of Delaware contemplating such procedure, and foreign attachment is entirely regulated by statute.

Cheshire National Bank vs. James, 112 N. E. Rep., 500, cited by counsel for defendants-in-error on the argument, is based on a statute different in terms from that of Delaware. It had apparently received an interpretation at variance with that given to the Delaware statute. There was no suggestion in the opinion of the Court in banc or of the Supreme Court in the present case that a special appearance without bail was possible. The Court dwelt on the injustice and hardship of the law. It would therefore have been but natural for it to have suggested the feasibility of appearing specially, had the existence of such procedure been recognized.

In his reply to the plaintiffs' motion to strike out the appearance and pleas filed by him, Ownbey deposed (*Rec.*, page 19) that the statutes of Delaware, upon due interpretation or construction, provide:

"a. That entry of the bail or security for the discharge of the property seized under such writ of foreign attachment is not a necessary prerequisite for the entry of appearance by the defendant in such writ;

b. That the entry of appearance by the defendant in the said writ may be made without disturbing the seizure of property thereunder or its security for any judgment finally entered in the suit;

c. That the purpose of this writ of foreign attachment is two-fold, to wit: To compel the appearance of the defendant in the cause and to devote or apply the value of the prop-

erty attached to the judgment, if any, obtained in the suit begun by such process;

d. Where, in any case, appearance had been entered by the defendant and pleas filed, no judgment can be entered until the trial of the issue so raised in said cause."

The Court, however, disregarded this contention and held that, without giving special bail, Ownbey could not contest the claim of Morgan's executors. Had the defendant been permitted to litigate under these circumstances he certainly would have been estopped from thereafter claiming that his appearance would operate as a dissolution of the attachment. Having secured the right to appear and defend upon the representation that the property attached would continue to be security for any judgment finally rendered, he would have been precluded from setting at naught such representation, if relied upon. The Court, however, with all the facts before it, denied Ownbey such relief as under the circumstances would have been just and equitable. In other words, there was no recognition on the part of the Court of the right of Ownbey to appear specially.

(2) It was also claimed by the defendants-in-error that Ownbey could have asked for a reduction of the amount of the special bail fixed by Morgan's executors. This contention is also untenable.

(a) Under Section 4123 of the Revised Code of Delaware, even had the Court undertaken to fix the amount of the special bail to be given, the

amount of such bail would have been measured by "the value of the property, rights, securities and moneys attached and the costs." According to the evidence this would have been not less than \$200,000, an amount of bail which the undisputed evidence shows Ownbey could not have secured. His deposition (*Rec.*, pages 24, 25) states that the shares of stock attached "*represented substantially the entire property and assets of your petitioner and in the opinion of your petitioner were and are of great value, to wit, of the value of upwards of Four hundred thousand Dollars. * * ** That by reason of the premises the market value of the shares of said company owned by your petitioner and attached as aforesaid has been temporarily destroyed, so that, from the time of the attachment of said shares in this cause down to this time and at present, it is not possible to ascertain any certain value of said shares, and, as your petitioner avers, *no value less than the said sum of Two hundred thousand Dollars, demanded as bail in the above cause.*"

Under the statute, therefore, the Court could not have reduced the bail below the value of the property attached as shown by Ownbey.

(b) Although Ownbey's unfortunate plight was disclosed to the Court on the various applications set forth in the record, there was not the slightest indication on the part of Morgan's Executors or on that of the Court of a readiness to reduce the amount of the bail. It was taken for granted that under the statute there could be no reduction.

(c) Under the practice of Delaware Ownbey would have been obliged to appear before he could

ask for a reduction of bail, and this he could not have done without first giving special bail. Such was the contention of defendants-in-error below and the decision of the Superior Court *in banc* and of the Supreme Court.

(3) Nor is there anything in the procedure of Delaware that would have enabled the Court informally to have determined whether or not Ownbey was indebted to the plaintiffs.

The decision of Judge Shippen in *Vienne vs. McCarthy*, 1 Dallas, 154, which refers to a procedure which does not appear to have been followed in Delaware, was merely directed to the determination as to whether or not the action of the plaintiff was vexatious.

The declaration of the plaintiffs set forth a claim, under the common counts, of an indebtedness from the defendant to Morgan's Executors of \$200,000. The defendant sought to file pleas of non-assumpsit, the statute of limitations and payment. An informal investigation would merely have disclosed the fact that there was an issue. That issue could only have been determined by a trial. The defendant was entitled to trial by jury of the issues. There is nothing to show that such a trial would have been possible without an appearance and the filing of pleas, which, under the decision of the Supreme Court of Delaware, could not be permitted without the giving of special bail. An informal investigation is not a valid substitute for an orderly trial, at which rights can be protected.

We call special attention to *Wells vs. Shreve's Admr.*, 2 Houston, 329, and *Frankel vs. Satterfield*, 9 Houston, 201, quoted on pages 33 and 34 of the

Brief of Defendants-in-error, where it is said of such a proceeding as the present that "whilst it continues such, there is no appearance of the defendant, no declaration filed, no defense whatever pleaded, no issue joined, and no trial had."

(4) The claim that Ownbey had the right within a year after a sale of the attached shares under the order of the Court made subsequent to the rendition of judgment by default, to disprove or avoid the debt which was the subject-matter of the attachment proceedings, as provided in Section 4135 of the Revised Code, did not afford sufficient protection to the defendant with respect to his property right in these shares.

It is to be borne in mind that this remedy merely related to a recovery by the defendant from the attaching creditor of the amount of dividends received by the latter from the proceeds of the sale. The creditor was obliged to give a bond to secure the repayment of such dividend if the debtor should within one year thereafter appear in court and disprove or avoid the debt. The property attached in the present case consisted of shares of stock, the intrinsic value of which the defendant claimed to be \$400,000. Because of the receivership proceedings in the courts of Colorado with respect to the corporation issuing these shares, the market value of the shares had been temporarily destroyed. A sale of the shares under the conditions shown, which indicated that the defendant could not have protected his interests at the sale, would unquestionably have resulted in a sacrifice of the value of these shares.

The remedy provided by the statute, therefore, was not the equivalent of a right to defend against

the plaintiffs' claim before judgment and execution. At the most, it merely enabled the defendant to litigate after judgment and execution and after the property which he sought to protect had been changed in form to the extent only of the amount received by the attaching creditor, from the proceeds of the sale of the shares attached. Thus, if the shares had been sold for \$10,000, the defendant could have merely recovered from the plaintiffs that sum, although the shares may have been intrinsically worth \$400,000, as shown by the record.

III.

The Court is requested to add, before the beginning of the last paragraph on page 87, the following:

After the Supreme Court of Delaware had decided in *Vogle vs. New Granada Canal Co.*, 1 Houston, 294, that the property of a foreign corporation was not subject to a foreign attachment, the laws of Delaware were amended by Chapter 124 of the Laws of 1857 in substantially the terms now to be found in Section 4143 of the Revised Code of Delaware. Section 4142, under which the property of a natural person who is not an inhabitant of Delaware may be subjected to foreign attachment, is to be found in juxtaposition to the act relating to a foreign attachment against foreign corporations on pages 12 and 13 of our main brief. The only difference between the two consists in the fact that a foreign corporation may, without giving special bail, cause an appearance to be entered by attorney, in which case the like proceedings are to be had as in suits commenced against a corporation

by summons. Special bail is only required of a corporation in the event that the defendant seeks to dissolve the foreign attachment. Otherwise the lien continues.

By the act of March 3, 1917, which is set forth on page 13 of the brief of the defendants-in-error, the law of Delaware relating to foreign attachment was amended so as to permit a defendant who is a natural person to enter an appearance and to make defense without the giving of security for the discharge of the attachment. There was, therefore, a distinct recognition by the Legislature that the same rule should apply in the case of a non-resident natural person as in the case of a foreign corporation. This confirmed the practice of Delaware to that of practically every other State of the Union. There could be no stronger evidence than this of the unreasonableness of the former statutory rule, and of the arbitrary nature of the distinction contained in the former statute. It seldom occurs that one can find, as is the case here, that a Legislature has by its own deliberate action declared its previous differentiation between a natural and an artificial person to be without justification. This Court is certainly warranted in accepting the determination of the Legislature as conclusive on that point.

It is not left to surmise as it sometimes is for a probable reason for a statutory classification. When the Legislature, under circumstances such as those appearing in the present case, annuls the classification its act must necessarily imply that the former classification was regarded as unreasonable and inequitable in its operation.

IV.

The Court is requested to add, at the end of Point II, page 92, the following:

The argument of defendants-in-error to the effect that the "equal protection clause" does not apply to Ownbey because he is a non-resident of Delaware, and, therefore, not a person "within its jurisdiction," overlooks the fact that his property sought to be seized under the authority of the statute of Delaware was within its jurisdiction. In like manner, if the property of a foreign corporation, located in Delaware, had been sought to be attached under its laws, such property would likewise have been within its jurisdiction.

As was said in *Pennoyer vs. Neff*, 95 U. S., 714, 727:

"The law assumes that property is always in the possession of its owner in person or by agent."

The primary purpose of the attachment proceedings was to bring the defendant into court (*Record*, page 53).

For all legal purposes, therefore, the plaintiff-in-error, though a non-resident of Delaware, was in possession of the property attached "within the jurisdiction."

See also

Herbert vs. Bicknell, 233 U. S., 70.

In *Maxwell vs. Bugbee*, 250 U. S., 525, where non-residents of New Jersey invoked the equal pro-

tection clause by way of attack on the constitutionality of the inheritance tax of that State, no question was made as to the right of such non-residents to attack the validity of the New Jersey statute on the ground that they were not persons within the jurisdiction of the State.

In *Steed vs. Harvey*, 18 Utah, 367, 54 Pac. Rep., 1011, 1012, the Court said:

"This provision forbids the State from denying to any person within its jurisdiction the equal protection of its laws. It secures to any person within its jurisdiction, though he may not be a citizen or even a resident, the protection of its laws equally with its own citizens; and this protection must be construed to mean protection to life, liberty and property, and the term 'property' must be held to include money due for the violation of a contract. To refuse the plaintiff, though not a citizen of this State, the right to maintain this action against the defendant found within its limits, would be to deny to him the equal protection of the laws."

Conversely, where a defendant has property whose situs is in Delaware and it is seized by attachment, so far as that property is concerned a denial to its owner of the right to litigate as to his right thereto when a foreign corporation similarly situated was given the right to litigate, would unquestionably deny to him the equal protection of the laws within the true intent and meaning of the Fourteenth Amendment.

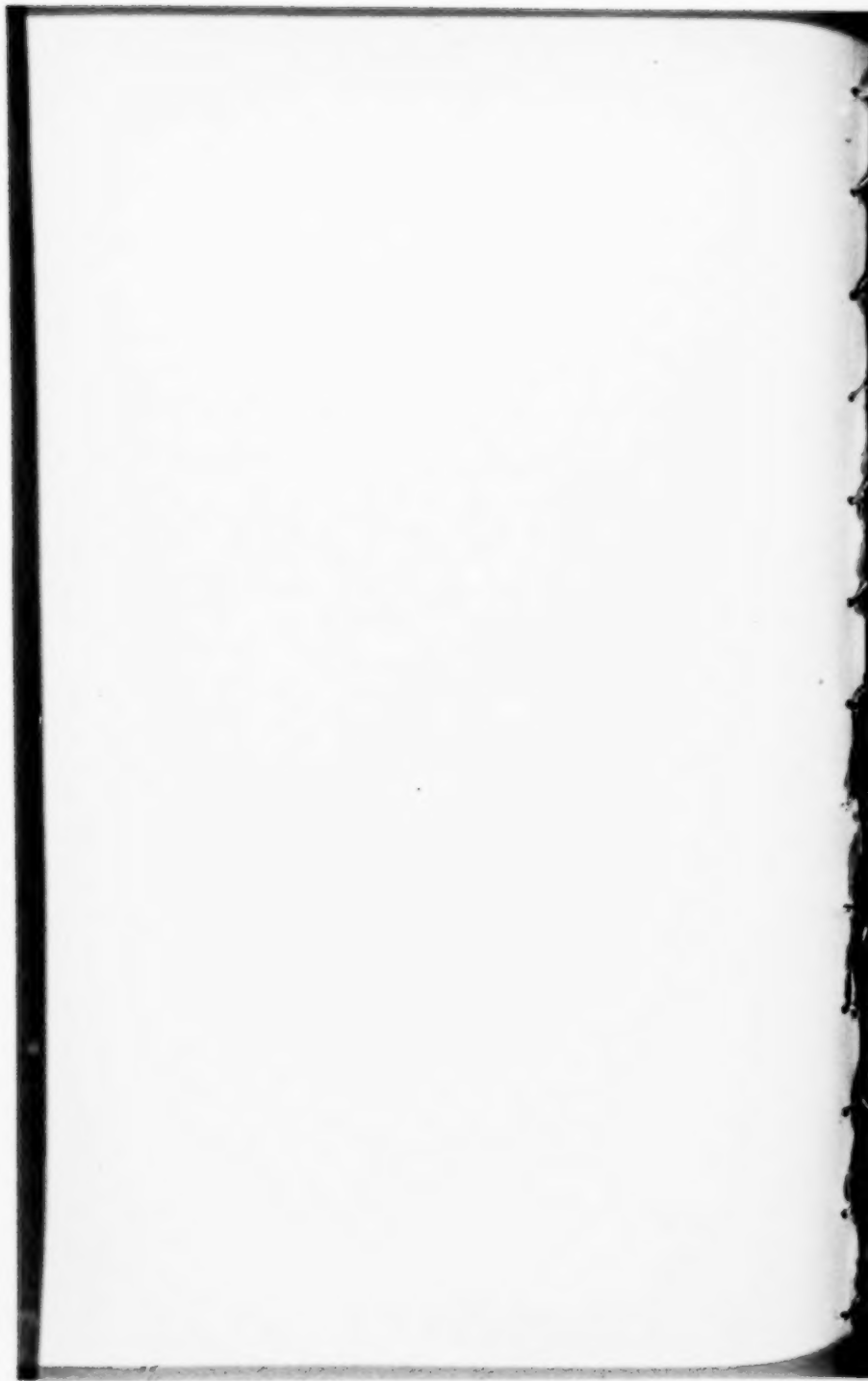
In *Blake vs. McClung*, 172 U. S., 239, there was merely the claim of a non-resident creditor to share

equally with resident creditors in the assets of an insolvent debtor. The claim did not relate to any specific property belonging to the non-resident. The subject-matter of the proceeding was the property of a resident insolvent corporation.

Here, the subject-matter of the attachment proceeding was property belonging to Ownbey, which had its situs in Delaware. That property was sought to be taken from him. The jurisdiction of the Delaware court was entirely dependent on the fact that the property of Ownbey was within the jurisdiction of Delaware, and presumptively in his possession. So far as the property seized was concerned, he was to be regarded as within the jurisdiction of Delaware. Jurisdiction over his property within Delaware necessarily placed him *pro tanto* within its jurisdiction.

Respectfully submitted,

LOUIS MARSHALL,
Counsel for Plaintiff-in-Error.



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JAMES A. HART

SUPREME COURT OF THE UNITED STATES

OUTOMBER TERM, 1900

NO. 99

JAMES OWNEY

Plaintiff in Error

against

JOHN PIERPONT MORGAN and others, as Executors
of the Estate of J. Pierpont Morgan, deceased

Defendants in Error

Memorandum for Defendant in Error

WILLIAM J. BROWN
Counsel for Plaintiff in Error

JOHN PIERPONT MORGAN
Counsel for Defendant in Error

Supreme Court of the United States

OCTOBER TERM, 1920.

JAMES OWNBEY,
Plaintiff-in-Error,
against

JOHN PIERPONT MORGAN and
others, as Executors of the Es-
tate of J. Pierpont Morgan,
deceased,
Defendants-in-Error.

No. 99.

MEMORANDUM FOR DEFENDANTS-IN- ERROR.

By permission of the Court, the following reply is made to the memorandum filed by plaintiff-in-error as supplemental to the brief and argument of the plaintiff-in-error.

I.

The case of *London Corporation v. London Joint Stock Bank* (1880), Law Reports, 5 Common Pleas Division, 494, and (1881), Law Reports, 6 Appeal Cases 393, appears to have no applicability to any question involved in this litigation. The sole question decided in that case was that the Custom of London with reference to foreign attachment was not applicable to a garnishee corporation, not the

defendant in the attachment proceeding. Since the process against the garnishee under the Custom of London was personal, it was held that it had no applicability where the garnishee was a corporation which was not subject to personal process, thus deciding the case upon the same ground as that relied upon in *Vogle v. New Granada Canal Co.*, (1856), 1 Houston, 294, in which the Delaware Courts held that the process of foreign attachment had no applicability to foreign corporations. This latter decision, as we have previously pointed out, led to the enactment of the Delaware Statute adopting a different procedure in the case of attachment of property of foreign corporations, from that applied in the case of attachment of property of non-resident individuals (see pages 94 to 98 of the Brief of the Defendants-in-Error). In *Matter of M'Queen v. Middletown Mfg. Co.* (1819), 16 Johns., 5, the Courts of New York made the same holding as did the Delaware Court in *Vogle v. New Granada Canal Co.*, *supra*. In 13 Am & Eng Enc. of Law (2nd Ed.), 894, it is said:

"The weight of authority seems to sustain the view that at common law a foreign corporation was not liable to suit in a domestic court unless jurisdiction was acquired by its voluntary appearance."

In the case at bar, no question of garnishment was involved. The subject matter of attachment was stock in a foreign corporation expressly made subject to attachment and to the procedure of foreign attachment by the laws of Delaware (see page 7 of the brief of the Defendants-in-Error). In *London Corporation v. London Joint Stock Bank*, *supra*, in the lower court (Law Reports, 5 Common

Pleas Division, p. 494), the procedure adopted was attacked because the Custom of London was not adhered to, but in the case at bar the statutory procedure of Delaware which was based on the Custom of London was strictly adhered to. Indeed, the argument made by counsel in *London Corporation v. London Joint Stock Bank* that an abuse of the custom should result in the refusal of the Court to recognize and follow it, was completely repudiated by Lord Blackburn (Law Reports, 6 Appeal Cases, at page 414).

That the Custom of London was a part of the common law enforced in appropriate cases by the common law courts appears from *Day v. Paupier* (1853), 13 Ad. & E., 802.

NOTE.

Mr. Saulsbury desires to make this technical correction of a statement made by him in his argument before the Supreme Court when he was discussing the power of the Delaware Court to inquire into the cause of action and reduce bail in foreign attachment cases. He was discussing and applying the principles stated by Judge Shippen in the case of *Vienne v. McCarthy* (1785), 1 Dallas, 154, printed in the brief of Defendant-in-Error at page 11, when he was asked (he thinks by Mr. Justice Pitney) whether the Court would have power to allow defendant to appear without bail. His answer was an affirmative, but it should have been that the Court had power to allow the defendant to appear on nominal bail, which was necessary to preserve the form of action, in cases where on examination into the cause of action on a motion to mitigate bail, there should appear to be really no cause of action, and the suit vexatious. In such case, the Court could fix the bail possibly at six cents, or some trifling amount sufficient only to cover costs.

defending his property, as was allowed in *Cheshire National Bank v. Jaynes*, 112 N. E., Rep., 500. The statement quoted, as the context shows, was made with reference to the case of *Dashwood v. Folks*, 3 Levinz, 343. That was a case in which the defendant had been taken on *capias*. Obviously in such a case there could be no question of appearing specially to defend the property, since no property was attached, and there could be no special appearance for such a purpose. The statement above quoted, therefore, is literally correct and entirely consistent, when applied to *Dashwood v. Folks*, with the decision in *Cheshire National Bank v. Jaynes*, *supra*, and with the argument of defendants-in-error, that plaintiff-in-error might, if he had sought to do so, been permitted to appear specially to defend the attached property. In the latter case, it was held as a matter of "general law, quite uncontrolled by statute" that a non-resident defendant whose property had been attached could appear specially for the purpose of defending the property without subjecting himself to the jurisdiction of the Court to render a personal judgment.

At page 3 of the memorandum of the plaintiff-in-error, it is stated that special appearance without special bail is not recognized in Delaware. The only possible construction of Section 4123 of the Revised Code of Delaware (set out in full at page 10 of the brief of the Defendants-in-Error) is that a defendant in foreign attachment may appear specially without giving special bail for the purpose of having the amount of security fixed. The plaintiff-in-error made no attempt to appear specially for this purpose, and hence is not in a

position to complain that he was not allowed so to appear.

Nor is it correct, as stated at page 5 of the memorandum of plaintiff-in-error, that "The Court, however, disregarded this contention and held that without giving special bail, Ownbey could not contest the claim of Morgan's Executors." All that was held by the Supreme Court of Delaware was that the defendant could not, without giving special bail, come in upon a general or common appearance and contest the claim of Morgan's Executors, because the effect of such common appearance would be to discharge the attachment. The plaintiff-in error never made any effort to mitigate bail or to appear specially for the purpose of defending the property without transforming the action into an action *in personam* and thus discharging the lien of the attachment. The courts of Delaware obviously could not decide questions which were not raised by the procedure of the plaintiff-in-error.

It is stated at page 5 of the memorandum of the plaintiff-in-error that the plaintiff-in-error, if allowed to appear generally, by common appearance without giving special bail, would have been estopped from claiming that the attachment had been dissolved. A complete answer to this suggestion is the opinion of the Supreme Court of Delaware (Record, pp. 50, 53); but in any event such an estoppel, if there were any estoppel, would not have been operative against other creditors of the plaintiff-in-error, and as soon as the plaintiff-in-error had appeared in this action generally, by common appearance, the stock attached would have been subject to attachment in any other action against

the plaintiff-in-error, and, in such event, forever free from the lien of the attachment and subsequent judgment of Morgan's executors. This is precisely what happened in *Tiernani v. Schley* (Va. 1830) 2 Leigh, 25.

In *Taylor v. Roasiter*, 6 Houston, 485, and in *Re Warthman*, 4 Pennewill, 319, it was decided by the Court, without any express authority of the statute, that the defendant, *after judgment* and before the sale of the property attached, had the right to enter his appearance, without giving security to dissolve the attachment, and to defend against the demand of the plaintiff. In one of these cases, the Court expressly said that the property seized by the attachment should be held under the attachment subject to the judgment of the Court until the question of the indebtedness of the defendant to the plaintiff was determined. As was pointed out by the Supreme Court of Delaware in the case at bar, at page 54 of the record:

"The defendant (plaintiff-in-error) seeks to meet this objection by citing two foreign attachment cases cited by this Court in which, upon motion, the judgment obtained by the plaintiff was opened and the defendant let into a trial. But it is to be noted that in those cases judgment had been recovered, and permitting the defendant thereafter to disprove plaintiffs' claim if he could, did not in any wise affect the lien of the judgment recovered in case the defendant failed in his defense. The lien on the property attached would, in that event, continue. In the two cases referred to the Court evidently treated the judgment recovered as a judgment by default, and embraced within the provisions of another statute of the State which permits the Court to open a judgment given by default in a summons

case, and let the defendant into a trial, provided it is shown that he has a legal defense, and had no knowledge of the suit, before the judgment was recovered. Revised Code, Sec. 4089."

These two cases, both Delaware cases, are therefore, express authority for the proposition that the plaintiff-in-error might have appeared in such a way as to preserve the attachment and at the same time contest the right to the judgment rendered in the action, but the only appearance which would content the plaintiff-in-error was a general appearance which would dissolve the attachment of the defendants-in-error.

The two cases last referred to were cited by the plaintiff-in-error in his brief in the Supreme Court of Delaware, yet he never attempted to follow any procedure which would bring him within the rule laid down by these decisions, and he now argues that the only method by which he could have protected his rights would have been by appearing generally and thus destroying the lien of the attachment secured by the defendants-in-error.

That a defendant is not deprived of his property without due process of law when he is allowed to appear and defend *after judgment*, is evident from the decision (under the Fifth Amendment) in *Herbert v. Bicknell* (1914) 233 U. S., 70, in which case the Court said, at page 74:

"It appears that the defendant had knowledge of the action before the time for a writ of error had expired and when it may be that it still would have been possible to set aside the judgment and to retry the case. He did not adopt the course that would have opened effective ground of attack even as the record

stood. We cannot discover that he has suffered any injustice—still less that he has been subjected to an unconstitutional wrong.”

III.

The plaintiff-in-error contends, at pages 9-10 of his memorandum, that because the Legislature of Delaware has repealed the statute which made a distinction between non-resident individuals and foreign corporations, that such distinction must have been unreasonable and arbitrary. In this connection, it is sufficient to call attention to the fact that the classification made by Section 221-b of the Tax Law of the State of New York, which classification was repealed and the repeal made retroactive by Chapter 644 of the Laws of 1920 of New York, was upheld by the Court of Appeals of New York in *Matter of Watson* (1919), 226 N. Y., 384, and, after the repeal, on a review of this decision by writ of error, by the Supreme Court of the United States in *Watson v. Comptroller of the State of New York*, decided at the October Term, 1920, and not yet reported.

The decision in *London Corporation v. London Joint Stock Bank* (1881), Law Reports, 6 Appeal Cases, 393, which rested squarely on the ground that the procedure in foreign attachment developed by the Custom of London was not applicable to a foreign corporation, supports the classification made by the Delaware statutes, following the decision in *Vogle v. New Granada Canal Co.* (Del., 1856), 1 Houston, 294, and establishes that the classification was not arbitrary and capricious and therefore, in the light of the decision of this Court in *Standard Oil Co. v. Tennessee* (1910), 217 U. S.,

413, and *Fort Smith Lumber Co. v. Arkansas* (1920), 251 U. S., 532, is not a denial of the equal protection of the laws.

See also

Matter of M'Queen v. Middletown Mfg. Co.
(N. Y., 1819), 16 Johns., 5;
13 Am. & Eng. Enc. of Law (2nd Ed.), 894.

IV.

The defendants-in-error do not overlook the point made at page 11 of the memorandum of plaintiff-in-error that plaintiff-in-error had property within the jurisdiction subject to attachment. This was precisely the situation in *Blake v. McClung* (1898), 172 U. S., 239, where the non-resident creditor held a debt of the resident corporation, which was subject to attachment within the jurisdiction. This was also the case in *Sully v. American National Bank* (1900), 178 U. S., 289, where the non-resident creditor, an individual, had a mortgage within the jurisdiction. It was also the case in *State v. Travelers' Ins. Co.* (1898), 70 Conn., 590, where the non-resident was a stockholder of a corporation within the jurisdiction; but in each of these cases the non-resident was held not to be within the jurisdiction within the meaning of the Fourteenth Amendment.

See also *Ashley v. Ryan* (1893), 153 U. S., 436, 440, where the question was raised, but disregarded by this Court.

In *Philadelphia Fire Ass'n. v. New York* (1886), 119 U. S., 110, it was held that a foreign insurance company which had been doing business within the State of New York for many years could not

complain that the exaction of a tax which it was required to pay before it was permitted to continue to do business in New York was a denial to it of the equal protection of the laws. This Court held that until it paid the tax it was not within the jurisdiction, and until it was within the jurisdiction it was not entitled to the equal protection of the laws, although it was actually in court as a party defendant in a litigation pending before the New York courts. In *Blake v. McClung*, *supra*, the foreign corporation had intervened as a party in the action, but this Court held that it was not within the jurisdiction of Tennessee because it was not doing business under any statute that would bring it *directly* under the jurisdiction of the courts of Tennessee *by service of process on its officers or agents* (172 U. S., 261; Brief of Defendants-in-Error, at pages 88 and 89). In *Sully v. American National Bank*, *supra*, a non-resident individual, Carhart, held a mortgage upon property in Tennessee, had intervened and was before the court, yet it was held that he was not within the jurisdiction of Tennessee. Therefore, in order that a defendant be within the jurisdiction of a State he must be *directly* subject to the service of process there, that is, he must be subject to service upon which a judgment *in personam* may be rendered. Not only is the plaintiff-in-error not directly subject to the service of process of Delaware, but he has never appeared in the action and no judgment *in personam* can be rendered against him.

If, in *Philadelphia Fire Ass'n v. New York*, *Blake v. McClung* and *Sully v. American National Bank*, parties who had appeared generally in the action were held not to be within the jurisdiction, *a fortiori* the plaintiff-in-error in the case at bar,

who has never appeared in the action and is not subject to a judgment *in personam*, is not within the jurisdiction.

Respectfully submitted,

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HARLAN F. STONE,
Of Counsel for Defendants-in-Error.